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Introductory Note

In 2007 the International Law Commission decided to include the topic “The protection of persons in the event of disasters” in its programme of work and appointed Eduardo Valencia-Ospina as Special Rapporteur. From the sixtieth (2008) to sixty-sixth sessions (2014), the Commission considered seven reports presented by the Special Rapporteur, as well as a comprehensive Memorandum prepared by the Secretariat of the ILC in December 2007 (A/CN.4/590). In 2014 the ILC adopted on first reading a set of 21 draft articles and commentaries on the protection of persons in the event of disasters (A/69/10, Chapter V). In accordance with its established practice, the Commission decided to transmit the Draft Articles to Governments, IOs, the ICRC and the IFRC for comments and observations, to be taken into account during the second reading.

In view of the relevance of this topic and to stimulate further analysis on the future activities in this area, the Department of Law, Roma Tre University, as part of the activities of the “International Disaster Law Project”, decided to host a selected group of experts from international organizations, academia, governments and civil society for a two-day frank and engaging discussion on the ILC’s Draft Articles, as adopted on first reading. The underlying idea was to facilitate an open discussion with relevant stakeholders and external experts at a critical moment for the Project, in anticipation of the second reading. The participation of high-level representatives of the main humanitarian organizations involved in the area as well as of renowned scholars emphasises the relevance of this Project outside the realm of the Commission.

This report summarizes the presentations made by the participants and the ensuing in-depth and vibrant discussions of the different issues addressed by the Draft Articles. A final session was devoted to the way forward for the Project and potential missing issues in the current text and Commentary. The meeting was held under “Chatham House rules”, and, accordingly, the report does not attribute any comment to participants or organizations.

This expert meeting would not have been possible without the participation of Eduardo Valencia-Ospina, Special Rapporteur of the ILC on this topic, who kindly accepted to be part of this initiative and whose activities I had the honour to support during last years. All participants, to whom I am very much indebted, provided significant contributions during the debates and I would also like to express my gratitude to those who agreed to present introductory remarks on each provision. A special mention goes also to Arnold Pronto who has been highly supportive of this event since its very beginning. The staff of the Department of Law was particularly helpful for the realization of this initiative, in particular through the support provided by its Dean, Prof. Paolo Benvenuti. Finally I wish to thank Tommaso Natoli and Alice Riccardi, who supported with great competence the elaboration of this final report. Tommaso Natoli prepared also some background documents (comments made at the 6th Committee of the UNGA and a comparison of the Draft Articles with other international provisions in this area), which were very helpful for participants.

I do hope that this document will serve its purpose, which is to further dialogue and interest in the Draft Articles currently adopted by the ILC in view of their final adoption and potential future additional activities in this area. International provisions could indeed play a significant role in shaping the legal framework relevant to facilitating assistance and reducing the risk of disasters, thus providing a significant contribution to the protection of victims of such events. For any additional information do not hesitate to contact me at: giulio.bartolini@uniroma3.it

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Tommaso Natoli, Post-Doc fellow, Roma Tre University
Kigab Park, Full professor of international law, Korea University, Seoul, Member ILC
Arnold Pronto, Senior legal officer, UN Office of Legal Affairs
Alice Riccardi, Post-Doc fellow, Uninettuno University
Marco Sassoli, Full professor of international law, University of Geneva
Joss Saunders, General Counsel, OXFAM, Oxford
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Rene Urueña, Associate professor of international law, Universidad de Los Andes, Bogotà
Eduardo Valencia-Ospina, Special Rapporteur, member of the ILC
Gabriella Venturini, Former full professor of international law, University of Milan
Margret Vidar, Legal Officer, Development Law Branch, FAO
Flavia Zorzi Giustiniani, Senior lecturer of international law, Uninettuno University
Executive Summary

The expert meeting was conducted through introductory remarks of pertinent draft articles and subsequent general debates. While general support was emphasised in relation to the large majority of the current Draft Articles, suggestions were made in order enhance the content of some provisions or its Commentary. Main issues addressed during the event have been collected in this section.

Draft articles 1 (Scope) and 2 (Purpose) establish the theoretical framework of the Project, stating that its main aim is to enhance the protection of persons in the event of a disaster by facilitating an adequate international response and guaranteeing an effective respect of their fundamental rights.

The discussion on draft article 1 mainly focused on some specific elements of its wording in the light of the references contained in the Commentary, as well as some possible reformulation that could redefine the field of application of the Project. The debate on draft article 2 mainly concerned the concept of “full respect of human rights”, and in particular the role of the affected State in relation to its own population, as well as that of the other actors involved. Some specific comments related to the link of the two provisions with other draft articles as those concerning risk reduction activities.

Draft article 3 (Definition of disaster) does not entirely consolidate already existing definitions but partly constitutes an original construction for international disaster law. The discussion focused on the threshold that the wording of draft article 3 establishes and the possibility of properly defining which kinds of events fall within its scope of application. Specific attention was given to the phrase “seriously disrupting the functioning of society”, whose elements could be better specified in the Commentary including the possibility of make an additional reference to the term “community”. Other issues analysed concerned, for instance, the possibility of including potential/imminent disasters and of expressly excluding armed conflicts per se from the definition of disasters. General support existed for not differentiating between man-made disasters and natural hazards, while additional attention could be paid to slow-onset disasters taking into account their peculiarities.

Draft article 4 (Use of terms) defines the relevant terms used within the instruments, with the aim of guaranteeing internal coherence by setting a general understanding of each single reference, as well as external coherence by providing a better specification of the scope of the Project. As for the importance of its function, the provision would benefit from the inclusion of additional terms (such as “relevant NGOs” or “Disaster Risk”), and from the clarification of other references such as “military personnel” or “entity”. Some specific remarks focused on the compatibility of the proposed definitions with other provisions of the Project.

Draft articles 5 (Human Dignity) and 6 (Human Rights) constitute a manifestation of the legal significance that the Draft Articles as a whole attach to individual rights and needs. Still, their specific content, implications, and scope of application could benefit from some clarifications. So far the ILC has preferred to keep the wording of the two provisions as simple as possible, by referring to other branches of international law, also in order to avoid a long debate on some theoretical issues. This drafting technique might leave some issues unresolved, e.g. regarding human rights derogations and limitations, rights relevant in case of disaster, extraterritoriality, and the application vis-à-vis international organizations and NGOs which could be properly addressed in the Commentary.

Draft article 7 (Humanitarian Principles) conveys the rationale underpinning the Draft Articles, i.e. the protection of persons during humanitarian assistance operations in the event of disasters.
Participants’ remarks focused on the proposal to extend the draft provision’s scope of application also to the prevention of disasters or to include additional concepts, such as independence. The possibility of envisaging a two-paragraphs solution was also addressed, in order to clarify to which actors humanitarian principles apply and their potentially different legal content.

Draft article 8 (Duty to cooperate) and 9 (Forms of cooperation) affirm the general duty of cooperation, which represents a cornerstone in disaster relief efforts, and illustrate the possible forms in which such obligation can be fulfilled. The main points that were raised during the meeting focused on the general balance between rights and duties of the actors involved and the actual meaning of the duty to cooperate. In that light, article 8 - considered as a duty of conduct - might play a significant role in order to harmonize the relations between sovereignty, the duty to seek assistance and the duty to not arbitrarily withhold consent to assistance, taking also into account the further consideration of issues such as a potential duty to consider requests of assistance. Eventually a mention on transit States or a reference to the coordinating role played by International organizations could represent additional values for this Project.

Draft article 10 (Cooperation for disaster risk reduction) and 11 (Duty to reduce the risk of disasters) constitute a valuable extension of the scope of the Project, aimed at encompassing also the risk reduction activities of disaster management besides the actual response. These provisions clearly fits with the recent evolution in analysis dealing with disasters and are largely in line with the Sendai Framework for Disaster Risk Reduction 2015-2030, even if they could take more advantage of the inclusion of certain related concepts as that of “prevention”, “vulnerability” or “resilience”. Furthermore an additional analysis of the concepts of “risk assessments” and “early warning system”, already included in draft article 10, could be helpful to clarify domestic measures expected to be adopted by States. Finally, a harmonization of the topic with other provisions of the Project, i.e. draft articles 3 and 4, could be considered.

Draft article 12 (Role of the affected State) consecrates the role of the affected State in furthering the obligation of result to ensure the protection of persons in the event of disasters. Some remarks were made concerning the notions of affected State, also taking into account cases of disintegration of governmental authority, and those of direction, control, coordination and supervision, which might need some clarifications in cases of complex emergencies. Moreover, the provision could be further secured against any permeation of the doctrine of R2P.

Draft article 13 (Duty of the affected State to seek external assistance) creates an independent primary obligation of conduct under international law. Three dimensions of this obligation might be strengthened: first, the criteria to establish whether the internal capacity of a State has been exceeded should be expounded; second, whether there is room for the ILC to progressively argue for an implicit request or implicit acceptance of international assistance by the affected State in some extreme cases; third, some elaboration on the legal consequences stemming from it would be welcomed, even if it was argued that this provision could play a positive role for humanitarian organization during negotiations with States in relation to access to the affected territory.

Draft article 14 (Consent of the affected State to external assistance) constitutes a fundamental advancement for international disaster law. Discussions focused on some elements, such as: the notion of arbitrarily withholding of consent and the criteria upon which it could be assessed and by whom; the extent to which draft article 14 crystallizes general international law and law-making
policy considerations regarding the inclusion of the provision in the current Project; and the possible legal consequences arising out of its violation.

**Draft article 15 (Conditions on the prevision of external assistance)** assumes a centerpiece position within the Draft Articles as it constitutes a bridge between its substantive and operational parts. To profit from its potential, draft article 15 might be more operationally-driven to be used as a harmonization tool for quality standards to be respected in providing assistance, also making an express reference to international instruments relevant in this area. Furthermore draft article 15 is strictly linked with other provisions dealing with the role of the affected State, as it reaffirms the right of this latter State to deny unwanted or unneeded assistance. At the same time draft article 15 puts some welcome boundaries on the discretion enjoyed by States in formulating their own conditions in this area, also in order to make them more predictable to assisting actors.

**Draft article 16 (Offers of external assistance)** possesses the clear rationale of setting out the role of external actors in the provision of external humanitarian assistance and constitutes a balance between States’ sovereignty, non-interference and the rights of those affected by disasters. Several issues were discussed in relation to this provision, such as: the possibility for the ILC to further consider the identification of entities allowed to exercise the right to offer assistance; the location of draft article 16 within the Project; the reference made to the terms “right” and “offer” in this provision; the entitlement to receive such offers; the link between such provision and issues related to non-interference and unfriendly acts; and the legal consequences attached to such right.

**Draft article 17 (Facilitation of external assistance)** aims at removing the practical obstacles encountered in disaster scenarios by addressing facilitation both from a legal and a policy point of view. In order to attain its goal, the ILC should think about detailing further its content: draft article 17 could establish basic operational rules for facilitation, also making reference to relevant standards in this area for the benefit of States, and enlarge the categories of facilitations which are relevant in this regard. Moreover, the provision could expand more on legislative and regulatory preparedness, in order to commit States to enacting appropriate legislation for when disasters strike. The possibility of differentiating between facilitations to be provided for relief activities and disaster risk reduction was also mentioned.

**Draft article 18 (Protection of relief personnel, equipment and goods)** represents a standard provision in international disaster law instruments aimed at both providing support to the victims and assuring external actors of the existence of an adequate security framework. Draft article 18 is based on two axes of pertinent legal obligations: on one hand an obligation of result can be identified aiming to prevent organs of the affected State from being directly involved in pursuing detrimental activities with regard to external relief personnel and their equipment and goods; on the other draft article 18 envisages an obligation of conduct in relation to potential activities of non-state actors which need to be fulfilled on the basis of a due diligence standard, taking into account its inherently dynamic and context-dependent nature.

**Draft article 19 (termination of external assistance)** constitutes the necessary counterpart to draft article 14. Its content has been described as partly different from some practice in this area, lacking an express reference to the possibility for the affected State to terminate at any time external assistance, while placing specific emphasis on the consultation process to be performed. Several participants emphasised that this latter requirement, similarly included in relevant practice, has
been maintained in order to minimize the potential negative effects for assisted communities, especially in cases when the affected State decides to interrupt activities carried out by expelling humanitarian actors with a very short notice. At the same time, some of the participants noted that the current wording could give rise to some interpretative problems, as the right of a State to ask for the withdrawal of external assistance should not be put into question.

**Draft article 20 (Relationship to special or other rules of international law)** aims at guaranteeing that the Project is flexible enough to accommodate other branches and rules of international law. The content of this provision appeared acceptable to the participants, to the extent that it permits to preserve a dense web of more specific legal commitments that many States have previously undertaken to abide by. The discussion focused on: the interpretation of the terms “special and other rules of international law”; the possibility of fostering the idea of giving precedence only to more favourable provisions external to the Project; and the relationship between draft articles 20 and 21.

**Draft article 21 (Relationship to international humanitarian law)** deals with the compatibility between IHL and the Draft Articles, leaving open the possibility of synergy in the application of the two branches in relation to so-called ‘complex emergencies’. This aspect was deeply debated by the participants, some of whom were inclined to consider the possibility of a mutual reinforcement of the two regimes, while some others underlined the difficult relationship existing between the wording of the provision and its Commentary as well as the possible problematic outcomes of the parallel application with the need to reaffirm in clear terms the precedence of the IHL regime in cases of armed conflict.

Finally, a concluding session was devoted to the final form of the current Project and additional topics to be addressed by the Commission in this area and a re-orientation of some of the current provisions. Concerning the first element, the debate centred around the possibility of the Commission proposing the negotiation of a binding universal treaty in the area, a possibility which was endorsed by several participants. With regard to potential additional issues to be addressed by the Special Rapporteur and the Commission, the attention focused on the possibility of paying attention to elements such as: the involvement of International Organizations in the proposed instrument; the need for a preamble and final clauses; additional topics to be addressed (e.g. the role of transit States; coordination of relief operations and the involvement of international organizations in this specific activity; quality of the assistance; etc.) Furthermore, in order for the Project to be more operationally-driven, the possibility of envisaging the current text as a framework convention to which specific technical annexes concerning detailed aspects of assistance could be attached was also proposed. Such technical documents could be developed in the future by competent fora charged with developing an universal treaty in this area, such as a Diplomatic Conference and related preparatory activities, or, similarly, such task could be attributed to experts of States and International Organizations parties to this instrument or to a Secretariat, which could also address the need to provide periodic updates of such standards.
**Table of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<td>AU</td>
<td>African Union</td>
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<td>CDEMA</td>
<td>Caribbean Disaster Emergency Management Agency</td>
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<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>DRR</td>
<td>Disaster Risk Reduction</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Convention on Human Rights</td>
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<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
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<td>IASC</td>
<td>Inter-Agency Standing Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IDRL</td>
<td>International Disaster Response Law</td>
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<td>IFRC</td>
<td>International Federation of Red Cross Red Crescent Societies</td>
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<td>IGO</td>
<td>Intergovernmental Organization</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IO</td>
<td>International Organization</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NGO</td>
<td>Non-governmental Organization</td>
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<tr>
<td>OCHA</td>
<td>Office for the Coordination of Humanitarian Affairs</td>
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<td>R2P</td>
<td>Responsibility to Protect</td>
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<tr>
<td>SAARC</td>
<td>South Asian Association for Regional Cooperation</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nation General Assembly</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNISDR</td>
<td>United Nations International Strategy for Disaster Reduction</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>WHO</td>
<td>World Health Organization</td>
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Reports of the Debates
Draft Article 1 [1]

Scope

The present draft articles apply to the protection of persons in the event of disasters.

Draft Article 2 [2]

Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

INTRODUCTION

The Speaker introduced draft articles 1 and 2 by recalling that the Special Rapporteur had initially submitted a proposal for one single provision that combined both the scope and the purpose of the Project. The Commission felt that such elements were separable concepts and on the recommendation of the Drafting Committee two provisions were adopted on first reading: draft article 1 on the scope and draft article 2 on the purpose of the Draft Articles.

The Speaker undertook an analysis of draft article 1 focusing on the four main issues addressed by the provision, i.e. its application ratione materiae, ratione personae, ratione temporis and ratione loci.

It was noted that the Draft Articles cover, ratione materiae, the rights and obligations of States affected by a disaster in respect of persons present on their territory or under their jurisdiction and control, as well as third States, international organizations and other entities in a position to cooperate. The fundamental approach was that such rights and obligations were to be understood to apply on two axes: the rights and obligations of States in relation to one another, and rights and obligations of States in relation to persons in need of protection. According to the Speaker, such approach was reflected throughout the Project.

Ratione personae it was recalled that the scope of the current Project was limited to natural persons affected by disasters. The focus was therefore primarily on the activities of the affected State and assisting States as well as on international organizations and other entities, such as the IFRC or the ICRC, enjoying specific international competences in this area. Activities of non-governmental organizations and other private actors were included, albeit only in a secondary manner, either because they were the direct beneficiaries of duties placed on States or indirectly as being subject to the domestic laws of the concerned States implementing the Draft Articles.

In relation to the ratione temporis element, the Speaker explained how the scope was primarily focused on the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase. Nonetheless, the project also extended to the pre-disaster phase as relating to disaster risk reduction and others aspects of prevention activities and mitigation measures.

Finally, ratione loci, the Draft Articles were not limited to activities in the arena of the disaster, but also covered those within assisting States and transit States. An important element that was noted
at that point was that the transboundary nature of a disaster was not a necessary condition for the triggering of the application of the Draft Articles.

The Speaker next proceeded with the analysis of draft article 2 on the purpose of the Project.

In that regard it was underlined how in his Preliminary report, presented in 2008, the Special Rapporteur had analysed the implications of the title of the Project for the determination of its substantive content. Since the topic concerned the protection of persons in a given event, namely disaster, the Special Rapporteur had singled out three legal branches of law related to international protection and assistance: International humanitarian law; International human rights law; International law on refugees and displaced persons, to which he reverted in each of the subsequent reports.

The Speaker emphasized that in his Preliminary report the Special Rapporteur had also stated that the title offered a distinct perspective on victims of disaster and therefore suggested the rights-based approach to the treatment of the topic. In that perspective, the Speaker remarked that the essence of a rights-based approach to protection and assistance was the identification of a specific standard of treatment, to which the victim of a disaster was entitled.

It was recalled that such position had given rise to an intense debate within the Commission, with members expressing diverse views thereon, and to give a sense of the flavour of the debate, the Speaker quoted three of the interventions made by members of the ILC in July-August 2008.

The first statement was made by Prof. Alain Pellet (UN Doc. A/CN.4/SR.2981): “With regard to the general approach to the topic, he was quite attracted to and convinced by the idea of an approach based on the rights of disaster victims. Moreover, he felt that here the Commission was on more solid ground, legally speaking, than if it approached the subject solely from the angle of State obligations. After all, the right to life and certain so-called “third-generation” rights – the right to food, medical care, etc. – belonged in all likelihood to positive law, and one might be justified, although the case was not as clear-cut, in viewing them as “enforceable” rights, which meant that they imposed obligations on a State vis-à-vis its population. [...] if the Commission really wished to deal with the topic, it should refrain from indulging in vain exhortations which, he repeated, did not form part of its mandate, and should content itself with what was reasonable and responsible, namely codification and progressive development of the right to protection, without troubling itself unduly with the means, even the legal means, whereby such protection should be achieved.”

The other comment quoted was made by Prof. Donald McRae (UN Doc. A/CN.4/SR.2981): “The real question was what consequences flowed from the Special Rapporteur’s focus on a rights-based approach. It was no doubt correct to say that the topic of protection of persons must be centred on persons. The real question, however, was whether the best way to protect persons in the event of disasters was to focus on their rights. He doubted that attempting to codify and progressively develop a catalogue of the rights of persons in the event of disasters was a useful exercise. To some extent that would mean simply articulating rights that already existed, thereby embroiling the Commission in lengthy and perhaps unproductive debates. It would also mean that attention would have to be given to the enforcement of rights. He suspected that such an approach would not live up to the international legal community’s expectations. The fact that individuals affected by disasters had rights was of course an important part of the background to the topic, but it was only the background. The real question was what action needed to be taken to protect those rights; and if action must be taken, then there must be obligations to act”.

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Finally, Prof. Ian Brownlie was mentioned (UN. Doc. A/CN.4/SR.2979): “While the compartmentalization of international law into international humanitarian law, international human rights law and international refugee law and other branches was useful for compiling a textbook, in practice it proved to be entirely artificial. Instead of basing itself on sources, which already involved creating separate ‘boxes’, it would be preferable for the Commission to base its approach on the problems that arose in practice. Quite a substantial corpus of law already existed, for example, on the situation of displaced persons and there was little to be gained from simply adding more material”.

In the Speaker’s view there was no contradiction between the rights-based approach and Prof. Brownlie’s problems-based approach, the purpose of which was to set standards for concrete cases of natural disasters or to use the terminology of international disaster relief law for the operational parts of those issues. That was why the work on the topic had been undertaken with a rights-based approach able to inform the operational mechanisms of protection as there was no a stark opposition between the two concepts. Under such view, ‘needs’ and ‘rights’ had to be seen as two sides of the same coin, which was the approach adopted by the Commission in developing draft article 2 on purpose.

GENERAL DEBATE

Participants generally welcomed the text of draft articles 1 and 2 and the subsequent debate mainly focused on some issues concerning the content of the Commentary, where significant elements had been included.

In that regard the well-known difficulty for the Commission to find a proper balance between the text of proposed provisions and the Commentary was recalled. In a similar vein a participant emphasized that the Commentary was an integral part of all of the ILC’s projects, and that the Draft Articles were to be read along with the Commentary, which was officially adopted by the Commission following an extensive debate. Still on the role of the Commentary, a participant maintained that, in the event of the subsequent adoption of the current Project as a binding treaty, the relevant provisions would take on their own life. In such case they would be mainly applied by practitioners, who could largely ignore the Commentary, focusing solely on the text. Therefore, the latter element of the Project could be expanded. Other participants emphasised that the Commentary was a common tool for legal practitioners and scholars and could still influence the implementation of the instrument, which could take benefit from including only a set of clear and concrete provisions.

Concerning draft article 1, a first set of comments related to the wording of the provision.

First it was noted that usually the scope simply states what situations a legal text apply to, without specifying details. In that regard, stating that the Draft Articles applied to a particular situation meant that anything that affected that situation would fall within its scope. Similarly, it was stressed that in other recent projects undertaken by the ILC, such as the one dealing with crimes against humanity, a provision very similar to draft article 1 had been adopted.

From a purely technical perspective, one of the participants suggested to slightly modify the wording of draft article 1 by substituting the current text “[t]he present draft articles apply to the protection of persons in the event of disasters” with the sentence “[t]he present draft articles apply to the protection of persons affected by disasters”. In his view there could be persons who were
affected by disasters but that were not in the arena of a disaster and it was not clear, under the existing formulation, if in those cases the Draft Articles would apply.

Another technical comment concerned the fact that, saying that the Draft Articles applied to the protection of persons in the event of disasters could entail a conflict with the content of draft articles 10 and 11 on disaster risk reduction. Those latter provisions were more focused on reducing the risk of disasters than protecting persons in the course of those events. The doubt was that draft article 1, which addressed the scope of the Project, did not adequately cover everything which was dealt within the Draft Articles.

With regard to the Commentary to draft article 1, one participant first noted how the content of the text was full of relevant information which could be better related to other sections of the Commentary. As an example, the Commentary to draft article 1 contains a reference to the fact that the transboundary nature of a disaster was not a necessary condition for the triggering of the application of the Draft Articles. Such qualification, which had been supported by the participant, had an indirect impact on draft article 3, whose Commentary failed to address the issue. Similarly another participant underlined the reference to transit States in relation to the application ratione loci of the Draft Articles. However transit States were not mentioned in other parts of the Project where an explicit application of relevant provisions to transit States could be helpful, as for instance in relation to draft article 17 (Facilitation of external assistance).

A last point concerned the reference to “civil society’ actors” included in paragraph (3) of the Commentary, which seemed to involve primarily NGOs. It was suggested to underline the role of other entities, such as private companies, which could deserve additional attention in the view of their current role in the disaster response phase. To underpin such need, a participant pointed out that international shipping and logistic companies had already signed memoranda of understanding with some of the main humanitarian actors, such as for instance OCHA, and States as well, on the basis of which they could deploy their personnel and provide specialized services at international airports as part of relief efforts. Similarly, another participant underlined relevant responsibilities and tasks carried out by the private sector in contemporary relief activities.

On that topic, another participant observed that the text already contained a general reference to “private actors”, a term of art which could eventually accommodate such specific scenarios. Furthermore, taking into account that according to the scope envisaged in draft article 1 anything that affected that situation, including the conduct of non-state actors, would fall within the scope of the Project, such a situation could be qualified as done by the current text. Moreover, it had to be emphasized that the Draft Articles had mainly been conceived for States and obligations referring to States could also encompass entities that cooperated with them or which were affected by national laws related to disasters.

Regarding draft article 2, one issue raised by participants related to the purpose of the Draft Articles which was connected to the need “to facilitate an adequate and effective response to disasters”. In that regard, in making reference to the Commentary, one participant underlined that to achieve drafting economy the Commission had preferred not to explicitly mention disaster risk reduction phases in the wording of draft article 2. However, taking into account the relevance of such issues, a suggestion was made to include it in the text of the relevant provision. Similarly a mention of measures related to the pre-disaster phase, such as early warning activities, could be accommodated in the Commentary.

Furthermore specific attention was afforded to the concept of human rights and ‘rights’ in general taking into account references to the expression “full respect of ...rights” enshrined in the text of
draft article 2. In that regard, it was noted that the Commentary to the provision went in-depth on those issues and contained detailed elements, especially if compared with the more laconic text of the commentary to draft article 6 (Human rights). For instance the Commentary to draft article 2 rightly interpreted the term “rights” as also encompassing rights acquired under domestic law, apart from those having their origins in human rights law. Furthermore a reference to economic and social was included.

In that context one participant emphasised the formula “with full respect of their rights”, which was contained in draft article 2. Taking into account that one of the main objects of the Project was to find a proper balance between State sovereignty and the need to protect persons, some doubts were raised on the concept of “full respect”. In particular it was also noted that the term “full” was not contained in draft article 6. In that regard the same participant recalled how in the course of public emergencies and disasters States could derogate from human rights, in order to deal with such extraordinary situations. In that context reference was made to derogation clauses in article 15 of the ECHR or article 4 of the ICCPR. Even if there was no proclamation of a state of emergency, States could refer to limitations provided by the same primary obligations on human rights in cases involving national security, protection of health, protection of the rights of others, etc., in order to balance different exigencies. As a result reference to the concept of “full respect for their rights” could be a bit misleading.

However, another participant emphasized that such formula should be interpreted as a neutral one, as the question on how those rights were to be enforced was left to the application of other relevant rules of international law, such as human rights law. As a result, issues dealing with derogations and similar problems could not be expected to be addressed by draft article 2 and clearly were not affected by the expression.

Another comment concerned the general structure of the Project as illustrated in the course of the introductory remarks, and in particular the second of the ‘two axes’ mentioned by the Speaker, namely the vertical concerning relations of a State vis-à-vis its own population. In that regard, it had been asserted that there were two dimensions that did not seem to be explicitly covered by the Draft Articles and by this provision. The first one can be described as the possible diagonal relation which could be established between an individual in the affected State and the assisting State. That scenario did not appear to be usually covered by traditional human rights law, unless in relation to extraterritorially issues. The second dimension related to the potential specific content of rights in disaster scenarios as they could eventually differ from the common obligations established by the international law of human rights. In other words, it was wondered whether the vertical dimension of this obligation entailed specific and innovative dynamics in terms of rights.

An additional element analysed by participants was the reference to “persons concerned” included in the text of draft article 2 in order to partly reduce its scope of application. According to one participant the Commission could further explore the issue taking into account the indirect consequences of a catastrophic event, also in the medium and long term.

Finally, a specific parallel was made by one of the participants, who found a relation between the concepts of “primary and secondary responsibility” which were reflected in the Commentary, and the concept of “shared responsibility” of stakeholders, which was introduced during the Sendai Conference on Disaster Risk Reduction. In the view of that participant, that new concept could help in defining the scope and purpose of the Draft Articles. First of all it could introduce a dimension that clearly involved non-State actors. Then it could condition the way in which primary responsibility needs to be exercised. The same participant suggested that the Project, to be in line with the overall tendency of the area, could shift from the concept of disaster to the concept of
risk. Such result could be achieved in the text and Commentary to draft articles 1 and 2 by not placing too much emphasis on the event itself.
Draft Article 3 [3]

Definition of disaster

“Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

INTRODUCTION

The Speaker opened his introduction to this draft article underlining how, in providing the definition of the notion of ‘disaster’, the Project did not consolidate already existing definitions but, rather, offered an original construction. The Speaker offered two main points regarding the construction.

The first point was related to the fact that disasters were defined in the text as “events or series of events” having certain specific consequences. By contrast, several definitions found in positive international law maintained that a disaster was a ‘situation’ in which a human society was already, or would imminently be, in grave trouble, notwithstanding the cause of it. As an example, the Speaker quoted the European Council decision 2014/415/UE on the arrangements for the implementation by the Union of the solidarity clause according to which: “disaster means any situation which has or may have a severe impact on people, the environment of property, including cultural heritage”. In the same vein, the agreement establishing the Caribbean disaster Emergency Management Agency (CDEMA) of 2008 provides that: “disaster means the exposure of the human habitat to the operation of forces of nature or to human intervention resulting in widespread destruction of lives or property,...”.

In that regard it was recalled that the Special Rapporteur had initially proposed the definition found in the Tampere Convention, which also defined disasters as ‘situations, whatever their causes’, and that he had proposed the definition of disaster to be: “means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss”.

The Speaker recalled that the Drafting Committee had rejected such formulation. In particular, some members of the Commission had argued that the definition had to include some causal elements in order to exclude crises that should not be considered stricto sensu as disasters, such as political and economic crises. This was what the Drafting Committee had wanted to capture by reorienting the definition, even if it was not immediately clear when one read the Commentary.

As a consequence, the definition adopted asserted that a disaster was not a ‘situation’ as such, but “a calamitous event series of events ...”, resulting in certain consequences. Two observations were made in relation to such wording. The first was that it was not clear in the English text if the adjective “calamitous” qualified both the event and the series of events, or if it qualifies only the event. In that view, looking at the French version of the same text, calamitous related only to “the event”, and not to the series of events. Under the French version, a disaster was: “une calamité ou une série d’événements ...” with some specific consequences. The Commentary clarified this point by stating that “series of event” referred to cases where not one, but a series of events, taken together, constituted a calamitous event. The proposal made by the Speaker was that draft article 3 could be clarified in this sense in the French version, so as to refer to: “un ou plusieurs événements calamiteux”.


The second observation concerned the fact that it was not clear what the adjective “calamitous” added to the definition. In French, “calamité” was a synonym for “catastrophe”, which meant disaster. As such, its inclusion did not clarify the notion of disaster.

On the same subject, the introduction had focused on the Commentary to the draft article, that gave three further indications. First, the formulation sought to cover only “extreme events”, and in that regard it was wondered what was and what was not an “extreme event”, which did not seem to be self-evident. By contrast, it was noted that in its report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, the Intergovernmental Panel on Climate Change had specifically defined “climate extremes”. In that context the Speaker wondered if, for instance, global warming could be qualified as an “extreme event” in the sense of the Project. It was suggested that it would be helpful to provide a negative answer to that question in order to clarify that the covered events were to be considered “extreme” by reference to both their low frequency and high severity.

It was further pointed out that the Commentary stated that an event should be qualified as “calamitous” if it resulted in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage. The Speaker noted that such result of the event was already expressly stated elsewhere in the definition of disasters. As such, qualifying the event as “calamitous” appeared here to be redundant.

Third, the Commentary also indicated that “calamitous event” had to be understood in the context of the scope and purpose of the Draft Articles, which was the protection of persons. The Speaker wondered whether to be a disaster, an event should be calamitous in the sense that it generated a necessity to protect persons. In the Speaker’s opinion this was already clear regarding events resulting in widespread loss of life, great human suffering and distress, but, at the same time, it was true that such an element could be useful in relation to large-scale environmental damage, to the extent that it could suggest that environmental damage was a disaster only insofar as it could have an impact on persons. The problematic issue which came to light was that the formulation of the text did not say as much. Providing that an event which ‘causes’ an environmental damage should be “calamitous” did not help to determine the ‘consequences’ of the environmental damage. Finally, doubts were expressed on the utility of the word “calamitous” in the definition.

The second point on which the Speaker focused his introduction concerned the notion of “serious disruption of the functioning of society”. Under the definition, the disaster was basically an event resulting in human suffering, “thereby seriously disrupting the functioning of society”, and he wondered about the precise meaning of such wording. It was noted that the Commentary explained what should ‘not’ be seen as a serious disruption of society, namely economic or political crisis. But widespread loss of life, great suffering and distress could well provoke a political or economic crisis, among other things, in the State affected. The point that could be clarified was whether, in the view of the Commission, such a consequence would disqualify the situation as a disaster.

Of course, what the Commission had sought to avoid was to include, within the notion of disaster, disastrous situations that found their ‘causes’ in economic or political crises. By contrast, the Speaker did not find that the Commission expressed any will to exclude from this definition calamitous events that, in addition to massive human sufferings, generated also economic or political crises. In his view, while the Commentary stated what was not a “serious disruption of society”, it did not explain at all what it could be.

It was recalled that such notion had been imported mainly from the Tampere Convention, in which it was not defined. But in that Convention, the term was at least clarified with reference to its
effects. In fact, the Convention stated that a disaster was “a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment”. It was also recalled that the first proposal of the Special Rapporteur had been based on this model. By contrast, in draft article 3 as modified by the Drafting Committee, the notion of “serious disruption of society” contained no reference to its consequences, because it was itself considered as the consequence of the other elements.

In the opinion of the Speaker, while the Drafting Committee had been quite creative in the development of that part of draft article 3, the final result could be problematic. For instance, taking into account draft article 11, which maintains that each State had to reduce the risk of disasters, under the current definition of disasters if States did what was necessary to reduce the risk of any disruption of society (whatever that meant) - but did nothing for the effective protection of persons - they would, nonetheless, satisfy their duty under the draft articles. As a result the Speaker expressed his general suggestion to reconsider at least the formulation of the relation of such criteria to others, or simply to abandon it, as it seemed that the definition could also stand without it.

**GENERAL DEBATE**

The discussion on draft article 3 covered various aspects of the definition of disaster, including its relevance in the light of the entirety of the Project.

One of the main aspects underlined concerned the threshold that the wording of the draft article established, which entailed a thorough examination of the terminology used. In that regard, some speakers suggested that the overall purpose of the Project be kept in mind, and that the definition be viewed as a potential tool for States and for the international community as a whole. Therefore, it appeared relevant to define properly which kinds of events could fall within the scope of application of draft article 3. At the same time it was maintained that difficulties in capturing the proper boundaries of basic legal definitions were common in several areas of international law, as evident for instance in the definitions of armed conflicts found in international humanitarian law.

The reference to “society”, made only in draft article 3 (“...seriously disrupting the functioning of society”), was considered to be potentially difficult to accept since other international documents, such as the ASEAN Convention and the UNISDR terminology, contained references to events seriously affecting the functioning of “a community or a society”. In that regard suggestions were made to align the text of draft article 3 with those instruments in order to encompass also events that affected a territorial community on a smaller scale. Such a solution would also be in line with the focus, which had recently been taken in the Sendai Framework for Disaster Risk Reduction 2015-2030, on “small-scale...frequent... disasters” as they also resulted in major losses in economic and social terms for involved communities, even if such events could hardly be qualified as severely affecting a “society”. While it was claimed that not all subsequent draft articles would be affected by the expanded definition of disaster proposed by some participants - since their scope of application was limited to large events, such as in the case of draft article 13 on the duty of the affected State to seek external assistance - it was noted that some draft articles would also be relevant in relation to small scale disasters, such as draft article 6 on human rights.

Furthermore, reference was made to how in other international disaster law instruments, such as Decision No. 1313/2013/EU of the European Parliament and the Council on a Union Civil Protection Mechanism or the 2000 Framework Convention on Civil Defence Assistance, the definition of
disaster also included the potential threats of a disaster, in order to make such instruments applicable also prior to a calamitous event actually occurring. Such additional element could be helpful to better manage disasters, as for instance to permit the application of provisions dealing with facilitation and privileges for external relief personnel in the context of an imminent disaster, for example floods or epidemics. In particular, mention was made to the Ebola crisis, an event that provoked widespread concern, independently of the initial number of victims, even though the early effects had not constituted a serious disruption for affected societies. As a result it was asserted that such element could also be included in the definition itself. On that point, another expert suggested that the concept of ‘distress’ could provide some guidance to address potential disasters, while another noted that, even if the ILC choose not to include potential threats in the definition in draft article 3, the subsequent integration in the Project of draft articles 10 and 11, dealing with disaster risk reduction, could provide a solution.

Some other participants underlined the need to clarify the threshold provided by draft article 3, particularly in relation to specific kinds of global slow-onset disasters such as global warming and climate change. According to that view, it was noted that the Commentary could give some guidance, so as to identify when slow-onset events could trigger the definition of disaster elaborated by the Commission.

A positive feature of the commentary to draft article 3 was the lack of differentiation between man-made disasters and natural hazards. This position was considered to be in line with other recent disaster law instruments, especially as it would be particularly difficult to differentiate events on the basis of their origins, taking into account their usually interrelated links. On this aspect, another speaker emphasized the possibility of drawing a distinction between the origin of the event and the event itself. Such distinction could have significant consequences for the definition, taking as an example the case of a flood provoked by the destruction of a dam, which in turn could be caused by an earthquake, terrorist attack or by bombing carried out by a third State. It was asserted that such distinction could have an effect on the definition contained in draft article 3, as some such events would be excluded from draft article 3, a provision which defines disasters only for the purposes of the Draft Articles. Furthermore the participant focused on the subjectivity characterizing the assessment of the threshold in the definition, and the possibility of conflicting evaluations.

Finally, in relation to events potentially covered by draft article 3, a participant observed that, in general terms, displacement of persons and migration had not been the object of specific analysis thus far, except for a few references to such phenomena in paragraph (7) of the Commentary to draft article 7, mentioning displaced persons as vulnerable groups, and in the Commentary to draft article 13 in relation to the granted to internally displaced children in the context of natural disasters by article 23 of the African Charter on the Rights and Welfare of the Child. While admittedly innovative, the possibility of including ‘displacement’ within the definition of disaster - as a form of human suffering mentioned in the definition - was proposed. The proposal was justified on the basis of the fact that displacement is proved to be one of the most recurrent consequences of disasters. According to the participant, if an explicit mention to displacement within the text of draft article 3 was considered too far looking in respect of definitions of disaster provided by international disaster law instruments, the notion of ‘displacement’ could at least be accommodated in the Commentary, which contained a mention in paragraph (6) to “severe dislocation”, the meaning of which, however, is not clear.

The second main issue raised by some participants was the relation between draft article 3 and armed conflicts. The core observation there concerned the fact that in the Commentary to the draft
article, no reference was made to the possibility of excluding armed conflict per se from the definition of disasters, as envisaged in draft article 3, according to the original proposal made by the Special Rapporteur. Such solution was clearly maintained in the Commentary to draft article 21, that dealt with the relationship with international humanitarian law, where the Commission emphasized the need “to avoid any interpretation that, for purposes of the draft articles, armed conflict would be covered to the extent that the threshold criteria in draft article 3 were satisfied”. However taking into account the relevance of such an issue it was observed that such solution should be clarified also in draft article 3 and its Commentary. It was also noted that in the comments made by several States in the Sixth Committee of the United Nations General Assembly, the solution to explicitly exclude armed conflicts from the definition of disaster had been widely accepted.

A participant expressed the view that it could be useful to locate draft article 21 closer to draft articles 3 and 4, since it related to the scope and application of the Project. Such solution could eventually guarantee a more coherent framework concerning the applicability of the Draft Articles. Another speaker recalled that the two draft articles had been closer at the time of their original adoption, and that the decision to move the second one down had been taken at a very later stage, and in line with the traditional approach of the Commission with regard to provisions dealing with the relationship with other areas of international law.

As regards the exclusion from the scope of application of the Draft Articles of cases of armed conflicts or other types of crises such as serious political or economic crises, some remarks were made concerning the possible applicability of the Project to situations of emergency posed by a series of violent acts, such as post-election riots or internal tension or domestic disturbances that do not amount to an armed conflict. If, as appeared, it was not the intention of the Commission to include such scenarios within the scope of application of the Project, perhaps it would be useful to provide some sort of explicit exclusions. This was also relevant taking into account situations of internal violence, also in post-disaster scenarios, which did not appear to be covered by the caveat dealing with political crisis, and which would otherwise risk meeting the threshold required by draft article 3 if such violence gave rise to great human suffering and distress, and serious disruption of the functioning of society.

More technical comments were made regarding the balance between the text of draft article 3 and its Commentary. Some participants asserted that the Commentary was a useful tool for juridical and theoretical interpretations, but that the effective impact of the Project would only arise from the proper wording of relevant provisions. However, for other participants draft article 3 could be regarded as an exception, and its Commentary had to be carefully analysed looking at the consequences that it posed for the entire Project. Another participant noted that such balance constituted a very common feature of the ILC’s work. During the negotiation process some elements were not included in the text of provisions adopted by the Commission in order to maintain a general consensus and, therefore, the Commentary represented a useful tool to balance different exigencies and keep significant elements within the arena of discussion.

Finally, it was considered interesting also to determine how - looking at the Project as a potential binding treaty – draft article 3 could be put in synergy with other international instruments, including those pertaining to regional systems. According to that view, a shared and well-established definition of some key terms, such as the “disruption of society”, would be helpful also to determine which response system was to be activated in any particular case. Similarly the potential interaction with national laws providing for declarations of the existence of a situation of disaster could be explored by the Commission.
Draft Article 4

Use of terms

For the purposes of the present draft articles:

(a) “affected State” means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(b) “assisting State” means a State providing assistance to an affected State at its request or with its consent;

(c) “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(d) “external assistance” means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

(e) “relief personnel” means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

(f) “equipment and goods” means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction.

INTRODUCTION

The Speaker opened his introduction by underlining how it was complex to analyse and comment a draft article that actually could be seen as six provisions in one. For this reason, his intervention was composed of a series of general observations, followed by specific comments on each of the 6 subparagraphs included in draft article 4.

The first point addressed was the purpose of the use of terms. It was explained that it was a provision that the ILC traditionally included in its instruments, especially those intended to be eventually adopted as binding texts. The aim of the draft article was to define common terms within the instruments, and this appeared to have two main objectives. The first was to guarantee internal coherence, by setting a common understanding of a single term throughout the Draft Articles. As such, the provision played the role of “linchpin” for the Project.

The chapeau of the draft article - “For the purposes of the present draft articles” - underlined such internal role and stressed that what was included therein had to be coherent within the Project. Furthermore the chapeau underlined the fact that definitions provided in draft article 2 were only developed for the purposes of the current Draft Articles and did not necessarily reflect general definitions. As a result, even if it was commonly recognized that definitions developed by the ILC were sometimes applied and referred to outside of its texts, due to its recognized role in developing international law, it had to be recalled that the phrase “for the purposes of the present draft articles” spoke to the internal role of definitions provided in draft article 4.
The second main purpose of this draft article, as identified by the Speaker, was related to the **external coherence** of the Project. In that regard, the use of terms also served as a specification of the scope of the Draft Articles. As such, the Speaker pointed to the link between draft articles 1 to 4, in that definitions were also relevant in determining the scope of applicability of the Project and its purpose.

In a similar manner, the synergy between the definition of disaster (draft article 3) and the use of terms was referred to. It was recalled that the Drafting Committee had opted to leave open the possible incorporation of draft article 3 into draft article 4 for consideration during the second reading.

The second main point concerned the **relationship with substantive provisions**. Each definition has to be read together with the respective draft article(s), namely the provisions in which the term appeared, and vice-versa, and this has to be taken in consideration also for the Commentary.

Then, the Speaker provided an insight into the **method for the selection of terms**. Some terms had already been singled out in the Commentary as candidates for definition, while others had been the object of a compromise within the Drafting Committee, meaning that a particular term had been adopted subject to a common understanding of its content. Other terms were selected for definition for the reason that they appeared multiple times throughout the Draft Articles, it being useful to provide a standard definition in order to guarantee internal coherence of the Project.

The **sources of the definitions** which had been utilized to elaborate the draft article could be identified both in texts previously adopted as part of the Commentary and in definitions included in other internationals instruments, subject to their concordance with the text already adopted by the Commission. In that regard main sources of reference were: Addendum I to the 2007 ILC Secretariat Memorandum (A/CN.4/590/Add.1); IFRC Guidelines (art. 2); Annex I to the IASC Operational Guidelines on the Protection of Persons in Situation of Natural Disasters (2011), and the International Law Institute’s resolution on humanitarian assistance adopted at its Bruges Session in 2003.

As regarding the **process of consideration**, the Speaker recalled how the Special Rapporteur had proposed a set of definitions in the Addendum to his 7th report (A/CN.4/668/Add.1), which was submitted to the ILC Commission in 2014. Following the debate in the Plenary, the Drafting Committee proceeded on a basis of a revised proposal, prepared by the Special Rapporteur, taking into account comments and suggestions made by ILC members during the debate. The Drafting Committee adopted a revised version, which was then adopted by the Commission on first reading, together with a commentary.

The Speaker continued his introduction by examining the **six definitions** separately.

Regarding **subparagraph “a” (affected State)**, he noted how this could be identified as a key term in the Project, appearing in a number of draft articles. The “affected State” was the main player to deal with, endowed with rights and responsibilities. The definition appeared to be clearly inspired by the IFRC Guidelines, which reflected its focus on persons. The main issue concerned the question of **territorial jurisdiction versus extraterritorial control**. In that regard through subparagraph “a” the Commission had adopted an expanded definition, even if the issue of which State’s consent was relevant in case of extra-territorial control of territory (i.e. the State purporting to act as the affected State, or the State on whose territory the disaster actually occurred) had been postponed for consideration during the second reading. Other elements that made for a more expansive definition were: the reference to damage to the environment, and the phrase “affected by a disaster”, which
was intended to place the focus on the effect of disaster, as opposed to the event itself, and thereby raising some doubts as to the concordance with draft article 3. It was observed that in the comments made by the States general support existed for including a broader definition to cover territorial control.

The term “assisting State” (subparagraph “b”), constituted the second of the three categories of covered entities (affected State, assisting State and other assisting actors), and appeared for example in draft article 19 on “termination of assistance”. Its wording, largely based on the definition contained in the Framework Convention on Civil Defence Assistance of 2000, established that a State was qualified as an “assisting” one only once assistance was actually being or had been provided to the affected State. Furthermore, the phrase “at its request or with its consent” reflected the interplay between this definition and draft articles 13, 14 and 16. Even in that case general support had been expressed by several States, and the only question that had been raised concerned the appropriateness of the express reference to consent in subparagraph b. For instance, as maintained by Austria, such reference concerned the application of the substantive provisions in question, and was not an issue to be dealt with in the use of terms. Other States, such as South Africa, conversely expressed their support for the inclusion of this element in the relevant definition of draft article 2.

The term “other assisting actor” (subparagraph “c”) appeared in draft article 19. This could be considered as a collective term for all possible assisting actors other than assisting States, which to a certain extent had already been defined in subparagraph b, including for example International Governmental and Non-Governmental Organizations. Furthermore it also contained a catch-all phrase (“or any other entity or person”) and in that regard it was possible to assert that “other entity” could also include the Red Cross Movement. That term appeared as an attempt to proceed without prejudice to their legal status under international law, and constituted – in the view of the Speaker – a very important aspect. The phrase “external to the affected State” could be considered here as a scope provision, excluding the applicability of the Draft Articles to domestic NGOs. This was to be understood as resulting from a policy decision, since the matter could also have been dealt with in the definition of “external assistance”. The initial proposal of the Special Rapporteur had contained detailed references to the type of assistance being envisaged by such actors, but at the end the wording of subparagraph “c” was harmonized with the ending of subparagraph “b” on “assisting State”.

The provision had attracted some comments by States and IOs at the 6th Committee of the UNGA. While some States, as Finland, supported this definition, the EU suggested clarifying in the commentary that the reference to “competent intergovernmental organizations” also included regional organizations. Portugal agreed with the definition but called for a better integration of its language with other draft articles, pointing out the discrepancies between it and references made exclusively to IGOs and/or NGOs in other draft articles. Such problem was to be understood as a function of the later-in-time adoption of draft article 4. Finally the inclusion of a specific reference to assistance provided by individuals had been suggested by Tonga.

The Speaker then continued with the examination of subparagraph “d” on “external assistance”. The term appeared in draft article 13, 14, 17, 18 and 19, and defined the type of assistance being envisaged by the Draft Articles. The definition itself was inspired, in part, by the Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, and reiterated the legal relationship between the assisting entities (States or other actors) and the affected State. The ending clause was a renvoi to the purpose of the Project as mentioned in draft article 2. It was observed that the exclusion of domestic actors was supported by Thailand.
The term “relief personnel” (subparagraph “e”), appeared in draft articles 9, 17 and 18 and sought to address the personnel component of external assistance involved both in disaster response and risk reduction activities. As a result it went in tandem with subparagraph “f” which dealt with “equipment and goods”. The definition established two categories of personnel: civilian and military. The first referred to personnel sent by assisting States and other actors. The reference to military personnel was inspired from a bilateral treaty between Greece and the Russian Federation. Furthermore the formula “sent by” was to be distinguished from “acting on behalf of” in order to maintain a difference in terms of responsibility. In that case the wording conformed with the notion that external relief personnel were acting under the control of the affected State, a solution which in turn presented some problems if applied to military personnel.

That part of subparagraph (e) had raised a significant number of comments by States and IOs. For instance the EU and Switzerland underlined the discrepancies with the Oslo Guidelines, which only envisaged the use of military assets as a ‘last resort’ option, while Austria pointed out that military personnel remained under the control of the assisting State, marking a difference with civilian personnel. India and Malaysia declared themselves concerned by the reference to military assets that could be send as part of the relief operation, which could amount for the former to the sanctioning of the encroachment of sovereignty, and which necessitated for the latter the prior consent of the affected State.

Finally, the term “equipment and goods” (subparagraph “f”) appeared in draft articles 9 and 17 and, as already indicated, constituted the counterpart to subparagraph (e) on “relief personnel”. It contained a non-exhaustive list of materials, and in particular, established a distinction between technical “equipment” required for the provision of assistance and “goods” necessary for the fulfilment of the essential needs of the affected population. Search dogs were specifically mentioned through the term “specially trained animals” drawn from the Kyoto Convention on the Simplification and Harmonization of Customs Procedures. Concerning relief ‘services’, which were not explicitly listed, the Speaker noted how the Commission had considered the definition to be flexible enough to cover also this relevant category.

Some final general remarks were made by the Speaker in order to conclude his introduction. The first one regarded the terms which were not included in the current draft article 4, such as “relevant non-governmental organization” and “risk of disasters”. According to the Speaker such definitions could eventually be addressed at a later stage by the Commission. The second remark was based on comments made by States at the 6th Committee of the UNGA, which emphasised the need to establish a distinction between DRR activities and relief response, as the wording of draft article 14 did. Finally the Speaker emphasized the need to clarify references made to military personnel in draft article 4, aligning it with the content of the Oslo Guidelines, and to provide coherence between the text of draft article 4 (a) and draft article 12 (where reference was only made to the notion of “sovereignty” of the affected State).

GENERAL DEBATE

Consonant with the general remarks, topics addressed during the discussion mainly concerned some of the issues raised by the Speaker along the lines of different subparagraphs.

Concerning subparagraph “a”, an initial element of discussion related to the notion of the sovereignty of the affected State. In particular, some participants analysed the compatibility of the definition of the affected State - as provided by subparagraph “a” - with other provisions of the
Project. For instance reference was made to draft article 12 according to which the affected State had certain duties “by virtue of its sovereignty”. In the opinion of some of the participants, even if it could make sense to include in the definition of the affected State a reference to areas under its jurisdiction or control - a solution which seemed to be inspired by the extraterritorial application of human rights conventions - the text had to be harmonized with draft article 12. The latter provision explicitly maintained that the affected State “by virtue of its sovereignty, ha[d] the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory”, thus not making a reference to other areas under its jurisdiction or control.

In relation to subparagraph “c” – which defined competent IGOs, relevant NGOs and other entities or individuals providing assistance as “other assisting actors” - some doubts were expressed in relation to the internal coherence of the Project. In particular the “catch-all” definition provided by subparagraph “c” was only maintained in draft article 19, while draft articles 5, 8 and 13 referred to IGOs and NGOs separately with some additional references to the IFRC and the ICRC.

From a semantic perspective, the reference to “entities” under the subparagraph devoted to “assisting actors” induced a participant to point out the possibility of considering also the concept of networks, such as the Global Outbreak Alert and Response network. Networks were obviously composed by entities themselves, but in practice they operated as a cluster where it could happen that there was not a particular entity sent by somebody else. Such possibility was also invoked for some competent IGOs, like NATO, which mostly did not provide assistance directly but rather coordinated request and offers of assistance by involved States.

In the view of other participants, the Commentary to the term “entity” needed to be modified. In its current text the Commentary maintained that that notion had to be understood as a term of art referring to the IFRC and ICRC. On the contrary, it was suggested that such text should make reference to the phrase “International Red Cross and Red Crescent Movement”, in order to include Red Cross and Red Crescent National Societies within the entities involved in the provision of external assistance. In that context it was also underlined that the Project seemed primarily aimed at regulating only international assistance, excluding the activity of local NGOs, even if some further provisions - such as those concerning respect for human rights - did not appear limited in scope.

With regard to subparagraph “e”, several comments focused on the reference made to civilian and military personnel.

A first element concerns the lack of coherence of the Draft Articles in the area. For instance subparagraph “d” - devoted to external assistance – and draft article 18 contained a simple reference to “relief personnel” without any qualification, while other draft articles made an explicit reference both to civilian and military personnel, as maintained in draft article 17.

Furthermore a common concern was the claimed lack of consistency of the Draft Articles with the Oslo Guidelines, which were mentioned in the Commentary only in relation to draft article 4, subparagraph “d”. On the contrary a mention to this document and its content with regard to subparagraph “e” was considered to be helpful to clarify the relationship between civilian and external military personnel. As affirmed by some participants the Oslo Guidelines maintained that the latter component could only be used on the basis of a ‘last resort’ principle in order to fulfil a humanitarian gap where there was no comparable civilian alternative and only where the use of military assets could meet a critical humanitarian need. In that regard, reference was also made to other soft-law documents claiming the application of similar principles. For instance reference was made to the European Consensus on Humanitarian Aid which linked the use of foreign military assets to the fulfilment of the “last resort” principle and reaffirmed that a humanitarian operation
making use of military assets had to retain its civilian nature and character. That implies that while military assets would remain under military control, the humanitarian operation as a whole had to remain under the overall authority and control of the responsible humanitarian organisation. In that regard, a participant made the suggestion to include the phrase “in line with international relevant guidelines” in the text of subparagraph “e”.

Another participant asserted that the relation between military and civilian personnel should be seen as synergistic and mutually favourable in the case of disasters, and that it should not be framed in the sense that the involvement of military personnel excluded civilian personnel and vice versa. It was recalled that reality was much more complex than that, and also that one should avoid the risk of depriving military personnel of their military nature, because that may have unintended consequences in terms of immunity or of Status of Force Agreements, thereby discouraging military involvement in providing assistance. At the same time, the consequences of a specific definition that clearly differentiated between civilian and military, or that stated that the military were not going to be considered as providing relief unless they acted as civilians, had to be carefully assessed, in order not to jeopardize the capacity of the armed forces to contribute to relief efforts.

An additional remark was made concerning the phrase “sent by” an assisting State or other assisting actors, included in the subparagraph on “relief personnel”. In particular, it was underlined that, in time of emergency, some relief personnel had been deployed by an IOs on the basis of prearranged stand-by arrangements with other humanitarian actors. For instance, in case of health emergencies the WHO could submit a request to some entities, such as a Ministry of Public Health or a NGOs, to deploy their personnel in the area of operation on the basis of contractual obligation to work with WHO or under its supervision. However such personnel were formally sent to the affected State by their own organization. As a result the formula “sent by” included in subparagraph “e” could be ambiguous in such contexts.

Finally another participant focused on the general conflation of disaster relief and disaster risk reduction activities, as apparent from the wording of subparagraph “e” concerning “relief personnel”. Reference was made to draft articles 17 and 18 which referred to “relief personnel” and whose application was therefore extended to personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction according to subparagraph “e”. According to the participant such privileges were mainly appropriate for humanitarian personnel providing actual relief, and their extension to personnel involved in disaster risk reduction activities was unwarranted. The current wording would let any personnel working to reduce the risk of disaster (potentially in every country of the world) free to assert the waiver of custom duties or taxes to enter and operate in that particular State. The possibility of introducing – during the second reading of the draft articles – a differentiation between the two areas of activities could therefore be explored.

A specific comment was made in reference to subparagraph “d”, in light of subparagraphs “e” and “f”. According to one participant, even if subparagraph “d” made a reference to “services” provided to an affected State, it seemed that the weight of the provision was mostly centred on “equipment and goods”. In particular, the Commentary contained primarily references to material supplies provided by assisting States and other assisting actors. In that context it was underlined that the Project focused on the “Protection of persons” and how the concept of ‘protection’ was much broader than just the material supplies in the case of disasters. In that regard mention was made of the definition of ‘protection’ provided by the IASC, the UNHCR’s ‘protection’ mandate and the ICRC’s concept of ‘protection’. Therefore, even if the Commentary contained some references to “services”, it was not clear whether some current activities relevant in disaster contexts, such as
communication services between beneficiaries and providers of assistance or activities performed by NGOs in the area of human rights protection or dealing with health issues in disaster scenarios, could be covered by subparagraphs “d”, “e” and “f”.

A related remark was expressed by another participant in relation to Disaster Risk Reduction, which seemed to have to do much more with services than with tangible objects. Furthermore according to that participant it should be evaluated whether all references made in the Project to “external assistance” or “equipment and goods” also referred to assistance for Disaster Risk Reduction activities. Such element was not entirely clear and according to that participant it could be excessive to extend the scope of the entire Project.

As regards the terminology used in subparagraph “d” it was emphasized that the definition of external assistance included the notion of ‘provision’ as alluded to in the phrase “relief personnel …and services provided to an affected State by ....”. As a consequence, the notion of provision of external assistance was redundant since external assistance already envisaged the act of providing some kind of services.

A final “cross-cutting” remark related to the point that draft article 4 contained definitions for the purposes of the present Draft Articles, and that a definition by itself did not provide content of obligations or rights, but simply defined what should be meant by certain terms. As such, the consequences of some solutions could only be inferred taking into account other provisions of the Project. For instance reference was made to draft article 15 which provided that the conditions for external assistance were to be determined by the affected State. That means that, in respect of the possibility to involve different categories of “relief personnel”, such as military or civilian ones, it was up to the affected State to request and authorize the most appropriated formula of assistance.
Draft Article 5 [7]

Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Draft Article 6 [8]

Human rights

Persons affected by disasters are entitled to respect for their human rights.

INTRODUCTION

The Speaker opened his introductory remarks by stating that both draft article 5 (Human Dignity) and draft article 6 (Human Rights) needed to be considered as expressions of the legal significance attached to individual rights and needs by the Draft as a whole, as also emphasized by paragraph (2) of the Commentary to draft article 2.

According to the Speaker such a dimension arose quite clearly ‘in general terms’, as much from draft article 1 - which expressly referred to the protection of persons - as from draft article 2, whose textual formulation (“...response to disasters” has to meet “...the essential needs of the persons concerned, with full respect for their rights”) emphasized the importance of a response addressing adequately and effectively the ‘needs’ of persons affected by disasters, and guaranteeing, ‘at the same time’, “respect for the rights of such persons”, without restricting such individual rights to internationally protected human rights, as emphasized in subsequent remarks.

Hence, the Speaker focused on the necessity of identifying the specific legal meaning of draft articles 5 and 6. In that regard it was emphasized that, if it was true, on one side, that both draft article 5 and 6 could be traced back to the general inspiration of the Draft Articles, on the other that did not relieve the task of trying to identify their autonomous, specific legal meaning, their reciprocal relationship, and their link with draft article 2. That being said, different considerations were submitted by the Speaker in order to fulfil that task, since draft articles 5 and 6 were provided with different legal meanings.

Insofar as draft article 5 was concerned the Speaker focused on the meaning of the expression “respect and protect” also in order to understand the meaning of the expression “human dignity” in such framework. According to the Speaker no doubts could be raised on the fact that the first expression referred both to “negative duties” as well as to “positive obligations”. This could be easily inferred as much from paragraph (6) of the Commentary to draft article 5, as from the legal meaning normally attached to such an expression in the general framework of international human rights law (see for instance art. 2, para. 1 of the ICCPR; General Comment to that article; as well as the entire case-law of the ECtHR and the IACHR). In that respect, it was worth mentioning that those
obligations also entailed that States had to act in order to avoid that conduct carried out by private individuals or groups of individuals - such as NGOs - could result in violations of such duties.

On the contrary, as to the legal meaning to be attached to the expression “human dignity”, no specific elements could be drawn either from the Commentary - despite the large amount of international legal instruments which were recalled - or from the general framework of international human rights law. In that regard mention was made to the well-known article of Christopher Mac Crudden (European Journal of International Law, 2008), in order to remind that the legal meaning of such an expression tended to change in international human rights law, depending upon the specific context where it is used.

In that regard the Speaker wondered whether the expression “respect for inherent dignity of the human person” was devoid of any precise legal effect. Similarly he wondered if such expression should be simply evaluated as a sort of generic reference to an extremely general principle. In case an opposite view should be provided it would be necessary to explore the legal effects of such a reference.

According to the Speaker that expression was far from being devoid of legal effects. More precisely it could assume different features as being: (i) a reference to the respect for the ‘hard core’ of internationally protected human rights - i.e. those ones which could not be derogated according to international binding human rights instruments (see art. 15 ECHR; art. 4 ICCPR; art. 27 IACHR) - as well as for the ‘hard core’ of other derogable rights; (ii) a reference to the respect for the ‘hard core’ of some basic social rights, like the right to food (see Committee on ESCR, General Comment N. 12 and the need to alleviate hunger); the right to water (see General Comment N. 15) and the right to receive urgent, necessary medical treatments (see General Comment N. 14). In that regard the Speaker subsequently analysed in-depth such preliminary conclusions also in order to examine basis of reaching a similar conclusion.

In that regard the Speaker recalled, first of all, that such a conclusion stemmed from a systematic and teleological interpretation of draft article 5, since the Project as a whole was aimed at coordinating the need for a timely and effective response to disaster with the respect for individual rights (against the backdrop of both draft articles 5 and 6). In that perspective, respect for some basic human rights - such as the just mentioned ones - could be considered as a reasonable way of coordinating the above legal values, also by taking into account that draft article 2 referred in a somewhat extensive manner to “rights” rather than “human rights”. In that regard mention was made to the Commentary to draft article 2, according to which also individual rights provided for by domestic law had to be considered in that respect.

Second - as far as civil and political rights were specifically concerned - the above conclusion was drawn from the basic legal significance provided to the expression “human dignity” within the field. In particular, according to the practice of judicial and quasi-judicial universal and regional human rights bodies, human dignity basically referred as much to rights which could not be derogated from, as to the respect for the ‘hard core’ of other rights which could, by contrast, be derogated from in states of emergency. In that context the 2008 Budayeva and others v. Russia Judgment of the European Court of Human Rights was qualified as particularly relevant with specific regard to the right to life.

Finally, - as far as social rights were specifically concerned - the above conclusion could be inferred from the abovementioned practice of the UN Committee on Economic, Social and Cultural Rights, according to which the hard core of the right to food, the right to water and the right to receive urgent, necessary medical treatments had to be guaranteed also in case of disasters.
The Speaker then turned his analysis on the meaning of draft article 6, especially as, at first sight, that provision could be considered as being unsuitable for posing any particular legal question. In particular draft article 6 appeared to have been conceived for simply reaffirming: (i) that international human rights obligations were to be fulfilled, even in case of disasters; (ii) that such obligations may stem as much from customary rules as from treaties (or even non-binding instruments); 3) that the above obligations concerned all the actors that could be involved in responding to disasters, such as States, International Organizations, NGOs. However, going further into his analysis, a couple of remarks were made by the Speaker.

First, leaving aside that NGOs could be hardly considered as being directly bound by positive international human rights law, such a provision risked to be quite far from being really effective, also with regard to International Organizations. Indeed, it was easy to observe that such entities are normally not parties to human rights treaties; and similarly the few customary human rights rules that were in force (genocide, torture, gross and systematic violations of human rights), were hardly applicable to the conduct they could adopt in responding to disasters.

The just mentioned circumstance shed therefore even more light on the importance that could be attached to the principle of respect for human dignity in responding to disasters, at least according to the approach adopted by the Speaker in his previous remarks on that principle. Although the legal meaning of such a principle was to be drawn from the general framework of international human rights law, the very fact that it was not, ‘as such’, a rule of treaty law, made it possible to consider it as being applicable also to international organizations. Additionally, such an extensive interpretation of draft article 6, also appeared to be coherent with draft article 2, as far as that provision textually referred, in a somewhat extensive manner, to “rights”, rather than to “human rights”.

Second, paragraph (3) of the Commentary to draft article 6 expressly stated that “The reference to ‘human rights’ incorporate[d] both the substantive rights and limitations that exist[ed] in the sphere of international human rights law”. It was clarified, in particular, that draft article 6 “...contemplate[d] an affected State’s right of derogation where recognized under existing international human rights law”.

Such a provision appeared to be very appropriate, given that in most cases of disasters - at variance with the opinion expressed by Walter Kälin in his 2012 article for the German Yearbook of International Law - States could be precisely induced to take measures derogating from their duties under human rights treaties. More precisely, by means of draft article 6, the procedural and substantive limits provided for by those treaties with regard to the above measures, seemed to be given the possibility of working in case of disasters.

Nevertheless, the Speaker still had the impression that draft article 6 was not completely suitable for facing complex human rights situations which could occur as a consequence of a disaster. Suffice it to think that the derogation clauses provided for by instruments concerning civil and political rights usually covered a very little amount of protected rights, whereas States may be induced to deny a larger amount of those rights on the pretext of responding to disasters. Furthermore it could be added that similar clauses could not be found in economic and social rights treaties, despite the importance that could be attached to the respect for fundamental economic and social rights in case of disaster.

Finally the Speaker made two possible proposals in this respect.
First of all, it would be appropriate to introduce into the Commentary a specific reference, aimed at extending the ‘incorporation clause’ - provided for by paragraph (3) of the Commentary itself - to the international practice concerning derogations. Such a reference would be able to also encompass the principle of respect for the ‘hard core’ of civil and political rights which could be derogated from in a state of emergency. This principle (i.e. respect, in states of emergency, also for the ‘hard core’ of rights that can be derogated) was commonly applied as much by the European Court and the Inter-American Court, as by the UN Human Rights Committee. A similar reference would also be able to contribute to coordinating draft article 6, as much with the ‘extensive’ inspiration of draft article 2, as with the legal meaning which was to be attached - in the Speaker’s opinion - to the principle of human dignity.

Furthermore the need for respecting the ‘noyau dur’ of the right to food, the right to water and the right to receive urgent, necessary medical treatments in responding to disasters, should be (analogously) contemplated by the Commentary to draft article 6, precisely as much in the light of the already mentioned practice of the UN Committee on Economic, Social and Cultural rights, as in the light of the ‘extensive’ inspiration of draft article 2 and the legal meaning of the principle of human dignity.

GENERAL DEBATE

The general discussion regarding draft articles 5 and 6 converged on a number of interrelated issues principally linked both to actors concerned by the application of those draft articles and to the wording of the provisions, especially in relation to the decision to prefer a cross-reference to other branches of international law rather than addressing in detailed terms such issues.

As to the first issue, i.e. actors concerned by the application of these provisions, an element addressed by some participants was the possibility of enhancing the analysis on the implications of those draft articles in relation to activities of non-State actors involved in assistance operations. In particular, it was suggested that either the text of draft articles 5 and 6 or their Commentaries might shed light on: (i) the due diligence obligations under human rights law of the affected State in relation to potential abuses carried out by these entities; (ii) the role of human rights standard for activities involving non-State actors, such as International Governmental or Non-Governmental Organizations and business entities providing humanitarian assistance. In that regard, however, some participants criticized such an approach. A preference was expressed for keeping those draft articles as simple as possible by leaving the resolutions of some theoretical and complex legal issues to different fora. Such a solution would not frustrate the drafting outcome and would avoid circular discussions on theoretical aspects.

Different positions were furthermore expressed concerning the legal basis for such potential references and international sources relevant in that regard. For instance one participant suggested that, given the position according to which non-State actors would be bound to respect customary international law through its incorporation into domestic law, the Commentary could embrace such standpoint. In such context the Commentary could specify at least that non-State actors were bound by human rights rules which corresponded to customary international law. Contrary to that position, another participant recalled that some national systems did not include an automatic incorporation clause for customary international law and, therefore, it would be difficult for the Draft Articles to generally adhere to the proposed suggestion. Finally, in that regard, another participant maintained that the Commentary to draft article 6, in its paragraph (4), already mentioned the “best practices for the protection of human rights included in non-binding texts on the international level”. This
phrase could accommodate soft-law instruments promoted at the UN level, specifically aimed to address how this Organization could deliver assistance in line with human rights standards, as well as practice related to requirements to be imposed on NGOs or other entities working on behalf of the UN, in terms of their respect for human rights.

Finally, on that issue, other participants suggested that draft article 6 could also elucidate the issue of the extraterritorial respect for human rights on the part of assisting States. According to another participant, as the Projects also sought to regulate what happened in the domestic sphere, rather than just focusing on international assistance, domestic actors had to receive a clear message as to legal obligations incumbent upon them.

As to the content of the provisions, the debate mainly focused on the relationship between the two draft articles and human rights instruments as well as on the coordination between draft articles 5 and 6 and other provisions of the Project.

With regard to the first issue participants addressed the choice made by the Commission to make a cross-reference to human rights law “without seeking to specify, add to, or qualify those obligations” as maintained in the Commentary to draft article 6.

In that regard some participants advocated for draft article 6 being more explicit in terms of its meaning and implications. This request was made taking into account that its audience would not only be limited to international lawyers but would, to the contrary, include disaster management officials and other practitioners who might not have a proper legal background. In that regard, it was recommended that draft article 6 or its Commentary should at least outline some topics and, consequently, several potential human rights issues were mentioned by participants, such as: the right of persons affected by a disaster to seek assistance from the territorial State and to have a voice in the planning and execution of relief response operations; the specific obligations that States have towards vulnerable groups and persons; the rights to be guaranteed during the recovery phase, etc.

Furthermore another participant perceived the wording of draft article 6 as being too prone to the language of civil and political rights, as it only referred to ‘respect’ for human rights. In that regard it was underlined that that term could not fully capture the nature of the obligations stemming from economic, social and cultural rights, which were interpreted as to imply not only an obligation to respect, but also obligations to protect, facilitate, fulfil and provide. In that context, it was emphasized that in disaster situations the obligation ‘to provide’ (e.g. the right to food) may be far more relevant than the obligation ‘to respect’ a given human right. It was also remarked that draft article 5 made reference to the terms “respect and protect” while draft article 6 only refers to the verb “to protect”.

However, other participants supported the current wording of draft articles 5 and 6 and were in favour of the option of keeping a very simple reference to such issues taking into account the difficulty of spelling out all legal problems related to the application of human rights in the case of disasters.

Concerning the relation between draft articles 5 and 6 and other provisions of the Project some comments were made by participants. First, a potential conflict between draft articles 6 and 2 was identified. Whereas the wording of the latter referred to the ‘full respect’ for the rights of persons concerned in disaster situations, the former did not. Moreover, paragraph (3) of the Commentary to draft article 6 recognized the “affected State’s right of derogation” and in fact derogations of individuals’ human rights – for instance, the right to property or the freedom of movement – could
be invoked by States vis-à-vis a declared state of emergency. Consequently that participant suggested deleting the term ‘full’ from draft article 2. From a different perspective another participant endorsed the proposal to delete the term ‘full’ as theoretically misleading: what could be limited or derogated under international human rights law was not the respect of the right, but rather the right itself. In such cases the fact that the right was limited or even derogated did not mean that the respect was not full because respect had to be in accordance with law.

Second, it was recommended to include in the Commentary to draft article 6 also the possibility of States limiting human rights. As it was drafted at present, the Commentary to draft article 6 at paragraph (3) only contemplated the right of States to derogate from human rights obligations, although in disaster scenarios States could eventually benefit from the inherent limitations recognized in primary human rights obligations, such as the protection of health, the rights of other individuals or national security concerns.

In that regard, however, another participant emphasized that some cautionary elements should be introduced in draft article 6 or in its Commentary in order to assess the legitimacy of affected States’ recourse to human rights derogations and limitations. During disasters some States might profit from the emergency situation and from the extreme vulnerability of individuals under their jurisdictions to adopt extraordinary unjustified measures resulting in potential human rights violations. As a consequence the Commission had to maintain a fair balance among different exigencies as disasters constituted a special moment in which caution had to be exercised in admitting the legitimacy of the proposed derogations and limitations.
Draft Article 7 [6]

Humanitarian principles

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

INTRODUCTION

By way of introduction, the Speaker emphasized the fundamental importance of the presence of draft article 7 within the ILC Project, as it highlighted the fact that the focus of legal issues vis-à-vis disasters was not simply to be on inter-State relationships or logistic aspects, but also on persons affected by calamitous events and principled humanitarian assistance with regard to preventive and response activities. He then analysed draft article 7 in several inter-related clusters of remarks.

The first cluster concerned the terminology employed in the title of the draft article which dealt with “humanitarian principles”. Two alternatives were possible. First, the formula could be restricted to “principles of humanitarian response”. Second, in order to capture the various phases of the disaster cycle, it might be preferable to use a broader expression capable of expanding the scope of the provision also to disaster risk reduction.

A second cluster concerned the subjective scope of application of draft article 7. It could be said that humanitarian principles could not be equally applied to the response activities of both States and humanitarian organizations.

For instance with regard to the principle of neutrality it could be underlined that States, especially the territorial State, could not be required to be neutral. Drawing upon IHL, the Speaker recalled that even that branch of international law did not require their assistance to be neutral: it only required it to be humanitarian and impartial. Accordingly, in that regard, it was preferable to make a distinction in the application of that principle in relation to the activities of humanitarian organizations and States. In any case, the Speaker made it clear that the possibility of deleting neutrality from draft article 7, vis-à-vis the fact that in classical disaster scenarios there are not two opposing parties, had to be ruled out: on the contrary, the Speaker considered neutrality a pivotal principle in disaster assistance activities, at least when they were undertaken by humanitarian organizations, because the reality suggested that disasters themselves could be exacerbated by a lack of good governance, discriminatory practices or even human rights violations.

Additional remarks were made concerning the non-discrimination clause and the obligation to consider the needs of particularly vulnerable victims of disasters envisaged in the last part of draft article 7 which had been qualified as a significant element of that provision. First, the Speaker underlined that those obligations were derived from and were an integral part of the principle of impartiality. Reference was made to the ICJ ruling in the Nicaragua case, which recognized that the principle of impartiality was a rule of general character applicable to humanitarian assistance. According to the ICJ, which based its interpretation on the fundamental principles declared by the Twentieth International Conference of the Red Cross, impartiality in assistance activities entailed not discriminating on the basis of victims’ nationality, race, religion, belief, class or political opinion. As a consequence, the relief of the suffering had to be solely guided by their needs so as to give
priority to the most urgent cases of distress. The Speaker suggested making it clear that those elements were aspects of the principle of impartiality, but agreed to mention them specifically. In fact they were the most delicate aspects of humanitarian response and indeed a lot of users, lacking a proper legal background, would not be aware of those basic principles.

Mention was also made of the issue of independence. Although absent in the wording of draft article 7, the principle of independence was referred to in some relevant international instruments such as: the 2000 Cotonou Agreement; the 375/2014 EU Regulation establishing the European Voluntary Humanitarian Aid Corps; the 2009 AU Convention for the protection and assistance of internally displaced persons in Africa; the reports of the UN Secretary-General on strengthening of the coordination of emergency humanitarian assistance of the UN; the 1994 Code of conduct for the International Red Cross and Red Crescent Movement and non-governmental organizations in Disaster Relief. Against that consistent practice, the Speaker suggested that a reference in draft article 7 to the obligation for humanitarian organizations to respect the principle of independence would be welcomed (while States could for obvious reasons not be independent).

Finally the Speaker focused on the possibility of divide draft article 7 into two different sections – one dealing with principles applicable to the activities of humanitarian International Governmental and Non-Governmental Organizations, and the other devoted to delineating principles related to the activities carried out by States. According to the Speaker there could be some differences in the interpretation and application of those principles in the area among different categories of actors.

**GENERAL DEBATE**

Consonant with the general remarks, the topics addressed during the discussion mainly concerned the scope of application of draft article 7 and its structure. Further, comments were made regarding the location of draft article 7 within the Draft Articles.

As to the first issue, some participants endorsed the Speaker’s call for extending the scope of draft article 7 to the prevention of disasters: non-discrimination, for instance, could be particularly relevant also in the case of disaster risk reduction, as in the case of activities to be carried out in an area where a minority lived and the central government acted short of the principle of impartiality. Accordingly, it was suggested that the text as well as the Commentary to draft article 7 might make reference to the application of humanitarian principles to disaster risk reduction activities. Other participants affirmed that further elaboration in the Commentary on the notion of impartiality would be welcomed.

Concerning the structure several issues were raised. For instance, regarding the Speaker’s proposal to divide draft article 7 so as to clarify which principles were applicable only to States and which only to IGO’s and NGO’s humanitarian organizations, some participants argued on the contrary that the draft article should be kept as drafted. Draft article 7 represented a reaffirmation of basic principles in the area as authoritatively recognized by UNGA Res. 46/182 and a good compromise among different exigencies. Furthermore it was emphasized that the Draft Articles were mainly based on an inter-State dynamic, rather than aiming to address the regulation of the activities of NGOs and IGOs.

One speaker suggested that the content of draft article 7 might well be placed also in the Preamble to the Draft Articles, as it echoed preambular language and played a crucial role within the general configuration of the Draft Articles. Indeed, draft article 7 has so far proven useful in assuaging some States’ concern that the Draft Articles, if turned into a treaty, would be capable of opening the door
to intervention into their internal affairs. In that regard it was also emphasized that subsequent provisions dealing with the relationship between the affected State and external assistance, such as draft article 15, made clear the necessity for external activities to be based on principled humanitarian assistance.

With regard to the structure of draft article 7, it was also observed that it was twofold: its first part concerning the principles of humanity, neutrality and impartiality would have an absolute character; while, on the contrary, its second part concerning non-discrimination would lack such character given its linkage with draft article 6 regarding human rights. Indeed, the possibility that non-discrimination might be limited or derogated from according to the contingent circumstances of a given disaster created some flexibility for States in applying draft article 7.
Draft Article 8 [5]

Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Draft Article 9 [5 bis]

Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

INTRODUCTION

The Speaker introduced his remarks concerning draft articles 8 and 9 by affirming that the general duty of cooperation has been reiterated in several international instruments adopted in that domain (starting from the UNGA res. 46/182), and represented a cornerstone in disaster relief efforts. In particular this duty has been conceived of as a specification of the principle of solidarity in the context of disaster relief and assistance. It was thus not surprising that such duty was also mentioned in the Draft Articles. In particular, while draft article 8 (Duty to cooperate) contained a general reference to the cooperation duty, draft article 9 (Forms of cooperation) highlighted some of the possible areas in which cooperation could be appropriate depending on the circumstances. According to the Speaker the rationale and the wording of draft article 9 did not seem particularly problematic. Consequently he focused his attention on some issues related to draft article 8.

The legal implications of draft article 8 were the first element of analysis. Indeed, even if the current text of draft article 8 seemed to imply a clear-cut legal obligation for both States and relevant assisting actors to cooperate within the framework of the Draft Articles, the legal effects and the scope of application of such an obligation still remained under discussion (particularly, as far as States were concerned). For instance, during debates in the 6th Committee of the UNGA it had been stressed that the cooperation-logic at the basis of draft article 8 had to also be extended to other provisions concerning the interaction between the affected State and third States, i.e. draft articles that had been formulated in terms of rights and duties. Under that view, the notion of ‘cooperation’ was understood as not implying legal obligations for involved States. In the same vein, the argument had also been made that the concept of cooperation should only refer to a moral (or political) obligation, without any possibility of legal enforcement.

As it is well known, the position expressed by the Special Rapporteur in his Fifth report is that to be legally and practically effective, the States’ duty to cooperate had to combine three different aspects. Firstly, such a duty could not intrude into the sovereignty of the affected States; secondly, its scope of application had to be limited to disaster relief assistance; and, thirdly, it had to be
conceived of as a legal obligation of conduct. Although the Special Rapporteur’s understanding of the duty at stake represented a useful attempt to clarify the contours of the legal implications emerging out from draft article 8, some of his arguments deserved additional attention in the view of the Speaker.

The first element concerned the interaction between the duty to cooperate and the position of both the affected State and third States. In the Commentary to draft article 13 (Duty of the affected State to seek external assistance) the duty to cooperate was mentioned as a part of the rationale of the legal obligation incumbent upon the affected State to seek assistance. In particular para. (2) of the Commentary stated that: “The duty to cooperate also underlie[d] an affected State’s duty to the extent that a disaster exceed[ed] its national response capacity. Draft article 8 affirm[ed] that the duty to cooperate [was] incumbent upon not only potential assisting States, but also affected States where such cooperation [was] appropriate. The Commission consider[ed] that such cooperation [was] both appropriate and required to the extent that an affected State’s national capacity [was] exceeded”.

Accordingly, the Speaker affirmed that the duty to cooperate might, in some (limited) circumstances, intrude into (or, at least, limit) the sovereignty of the affected State. For the sake of clarity, such circumstance had to also be mentioned in the Commentary to draft article 8 (which only made reference to the primary role of the affected State to take care of the persons affected by natural or man-made disasters which occurred [on] its territory).

Concerning the impact of such duty on the sovereignty of third States, the Speaker noted first that following a precise question posed by the ILC in 2011 – many States in the 6th Committee of the UNGA replied that the duty of cooperation could not include an obligation upon States to provide assistance when requested by the affected State, this last duty having no basis in current international law. However, as it had been rightly highlighted by some States in the Sixth Committee (e.g. Austria, Thailand, and Sri Lanka), it was difficult to understand, from a general point of view, why it was possible to impose (in some cases) upon the affected States – also on the basis of the duty to cooperate – an obligation to seek assistance when third States still remained (completely) free to decide whether or not to offer such assistance (see, in this respect, draft article 16). According to the Speaker, such situation created an imbalance in the allocation of rights and duties among States, as well as in the way in which the duty to cooperate was to be enforced in a disaster scenario, thereby risking undermining the effectiveness of the relief assistance. He indicated that a clarification on that would be very welcomed.

Then the Speaker focused his remarks on a second element, i.e. the global understanding of the cooperation duties. As had been already mentioned, the Special Rapporteur conceived those duties as obligations of conduct. However, the Commentary to draft article 8 did not contain any reference to such circumstance. Moreover, some of the (non-exhaustive) forms of cooperation listed in draft article 9 seemed to make reference to the possibility of invoking cooperation duties of result (e.g. making available relief personnel), a further element which could be clarified in the future activities of the Commission.

On the other hand, and although the question was very sensitive, the Speaker made some reference to the possibility of verifying whether and to what extent the duty to cooperate could be considered as a possible source of erga omnes obligations at international level, as the ILC also stressed at the very beginning of its work on the subject matter. In that regard mention was made to the Report of the ILC on the work of its sixtieth session where a reference was made to the need to “also deal with rights and duties of the international community as a whole, thus helping to elucidate the content
of obligations erga omnes” (para. 231). However, no references to such obligations were present in the Draft Articles or in the Commentary. A further analysis of that topic was considered helpful.

Finally, the Speaker suggested avoiding separating the cooperation duties operating in disaster relief assistance from the similar duties that could be invoked in the disaster risk reduction phase (mentioned in draft article 10). A general, comprehensive cooperation clause was considered preferable.

**GENERAL DEBATE**

The main points of the discussion focused on the role of draft article 8, particularly in the view of the general balance between rights and duties of the main actors involved and the actual meaning of the duty to cooperate.

In particular several participants noted how the presence of this article served as a good counterbalance to the extent that, without it, the Project would mainly focus on obligations pertaining to the affected State. On the contrary, draft article 8 opened the possibility of influencing the conduct of the assisting State and other assisting actors, such as International Governmental and Non-Governmental Organizations. It was recalled that such views had been considered particularly relevant also during the debates in the 6th Committee of the UNGA concerning the possibility of developing a ‘duty to consider requests for assistance’ or a ‘duty not to arbitrarily refuse assistance’ where assistance has been explicitly requested by an affected State. Such proposals, even if they had some merits especially taking into account the parallel obligation enshrined in draft article 14, had not found specific support in the 6th Committee of the UNGA and consequently had not been the object of further activities by the Commission or the Special Rapporteur. Nonetheless, also from a law-making policy perspective, draft article 8 could play a significant role in harmonizing the relations between sovereignty, the duty to seek assistance and the duty to not arbitrarily withhold consent to assistance.

The usefulness of draft article 8 was also noted by reference to what had happened in some recent disasters, when there had been serious problems of coordination among involved actors, with some States taking the lead without providing sufficient information to other assisting States and hindering their activities. In that regard the problem of cooperation and coordination had to be regarded as a realistic one, which therefore increased the importance of maintaining such provision in the Project.

In the same vein, contrary to the Speaker’s presentation which had mainly focused on the relation between the affected State and assisting States, another issue that was pointed out concerned the fact that the duty to cooperate expressed in draft article 8 could not be seen as simply relating to the relationship between the affected State and the assisting States, but had to also take into account the overall cooperation and coordination between all the assisting actors concerned. A significant role in cooperation activities was played by other assisting actors, especially International Organizations, which usually contributed to needs assessments, coordination of international assistance, etc.. In the view of one of the participants, that aspect remained somewhat vague in the Project and could be further addressed also in the Commentary to draft article 8.

Concerning the content of the obligation enshrined in draft article 8 some remarks were made regarding the effective nature of that obligation, as it appeared difficult to encapsulate its content in a concrete way. For instance one participant mentioned that such duty to cooperate could have an impact on the evaluation of consent issues in case a valid principled offer of assistance had been
provided. Similarly the same participant emphasised that such obligation could have an indirect impact on facilities to be provided for external assistance. Other participants advocated in favour of draft article 8, by asserting that the *raison d’être* of its content was sufficient. The duty to cooperate had to be read in combination with draft article 9 which specified the forms of cooperation. Under the same view, draft articles 12, 13, 14(2) and 16 had to be considered as collateral to draft article 8 which offered a sort of point of balance and harmonization among all those provisions. As a result, except perhaps for the possibility of extending its interpretation to an obligation not to interfere in the provision of assistance provided by others actors, to add different or additional meanings to the wording of the two draft articles would probably not be necessary.

The need to maintain a sort of *coherence between the different relevant obligations* contained in the Draft Articles was noted by another participant, with particular regard to the fact that in his view the duty to cooperate had to be considered as a duty of conduct. In that case, it was observed that other duties foreseen in the Project were also to be understood in the same way. To maintain an effective legal structure in the Draft Articles, it seemed necessary to connect the content of the different obligations, with particular regard to draft article 13 on the duty to seek assistance, in a cohesive manner.

In that sense some participants expressed their hope that the ILC would elaborate a little bit more on the duty to cooperate, clarifying its meaning also in relation to its common understanding. However, at the same time, participants were aware of the difficulties of spelling out in clear legal terms similar provisions dealing with cooperation activities, as provided for instance by art. 56 of the UN Charter.

A specific point was mentioned by one of the speakers, concerning the fact that the content of draft article 8 was of particular importance if applied to transit States. This was because, in most cases, the transit through the territory of a third State was the only way in which the actual assistance might reach the relevant affected population. It was suggested that such aspect could be developed further during the second reading in order to improve the effectiveness of the provision. Eventually a specific provision on transit States could represent an additional value for the Project.

A specific remark was made concerning the explicit mention of the ICRC in the text of draft article 8. One of the participants asserted that such mention was out of place, due to the fact that the ICRC negotiated access to the victims of a humanitarian crises provoked by an armed conflict on the basis of rules on humanitarian assistance provided by international humanitarian law. As a result it was probably better to delete any specific mention to the ICRC in the text of draft article 8.
INTRODUCTION

The Speaker structured his introduction of draft articles 10 and 11 by undertaking an overall comparison of their contents to the Sendai Framework for Disaster Risk Reduction 2015 – 2030, and in particular with its main outcomes, strategies and documents. A first general observation concerned the fact that the Sendai Framework and the Draft Articles - including its Commentary - could be considered as two aligned tools. Then, the analysis focused mainly on draft article 11, in relation to which the Speaker identified four main issues, namely: (i) natural versus man-made hazards; (ii) international legal obligations versus responsibility; (iii) measures to be adopted; and (iv) the notion of risk.

The first element addressed by the Speaker concerned the issue ‘natural versus man-made hazards’. It was recalled that there had been a long standing discussion among experts in the area of disaster risk reduction, especially at the time of the implementation of the Hyogo Framework for Action. Such a debate had led to an ambiguous definition concerning its scope of application, and in particular did not contain any clarification as to the possibility of including man-made disasters in it. The ILC’s Project was helpful in that regard, taking into account the encompassing definition of disaster maintained by draft article 3 which sought to cover both natural and man-made disasters. It was observed that, within the contemporary framework of disaster risk reduction, the issue had been solved by paragraph 15 of the Sendai Framework. In that document, the alignment with the position adopted in the Draft Articles was underlined through the inclusion of references made to man-made hazards as well as related environmental, technological and biological hazards and risks.

The second point raised by the Speaker concerned the issue ‘international legal obligations versus responsibility’. It was explained how the Sendai Framework had been relatively ‘shy’ in that area since it did not speak openly in terms of legal obligations. Nonetheless, during the negotiations, there had been many countries that actually wanted the Sendai Framework to be a legally binding instrument, even if the process itself did not foresee such possibility. Nonetheless, such undercurrent of thinking could be detected in the document by a joint reading of the different
provisions on accountability which were described as being extraordinarily strong. In fact, there were many provisions that referred to strengthening mechanisms, setting of standards, defining laws, legislation and plans, reporting duties, disclosure and so on. The Speaker expressed the view that the Sendai Framework strengthened, in a certain way, the line of argument which was being espoused by the ILC Draft Articles and its Commentary, according to which States had a duty to reduce the risk of disasters by taking necessary and appropriate measures, even if the Sendai Framework did not necessarily mention a particular legal obligation.

The third aspect of the introduction focused on the specific and concrete measures that could be identified in terms of disaster risk reduction. In that regard, the second paragraph of draft article 11 identified three possibilities, but the Commentary was quite clear in explaining that those were not the solely measures that could be considered as eligible to be implemented by States. The Commission had specified how those measures, being at the core of the disaster risk reduction efforts, had to be considered as instrumental to others. Once again, a comparative analysis with the Sendai Framework could provide a clearer articulation of measures that could be potentially adopted, going beyond the three already mentioned in draft article 11.

Consequently, it demonstrated how the Sendai Framework also conformed with the ‘dual axis’ approach mentioned in the ILC’s Commentary. In particular, its priorities were structured along two fundamental clusters: national and local action versus global and regional action. States’ obligations in this area could also be identified along a dual axis, namely duties towards other States and also vis-à-vis the population located in their territories.

The last point of the introduction to draft article 11 concerned the issue of ‘disaster versus risk’. On that aspect, the Sendai Framework was considered as being innovative in comparison to the Draft Articles. This was because the first paragraph of the draft article referred to actions aimed to prevent, mitigate and prepare, whereas the Sendai Framework went beyond those aspects and focused on prevention of new risks, reduction of the existing and then strengthening of resilience, in order to adopt an innovative interpretation of the concept of ‘prevention’. Therefore, the Speaker wondered if and how the Commentary to the draft article to be adopted on second reading could ‘capture’ such innovation. The Speaker did not believe there was an inherent contradiction between the two documents. However the Sendai Framework mainly shifted the focus on the genesis of risks and not necessarily only in relation to the reduction of existing risks. It was noted that the type of action that needed to be taken in preventing the creation of new risks, was probably different from that that needed to be adopted to reduce existing risks.

The Speaker then commented on the content of draft article 10 on cooperation for disaster risk reduction, asserting that even in that case a strong alignment between the Sendai Framework and what had been proposed by the Commission could be detected. In particular, the structure of the former document seemed to offer some guidelines for the interpretation of the provision and, in that regard, it identified almost two complementary clusters: the first element was cooperation among States regardless of their level of development - considering that disaster risk affects rich and poor countries - and the second cooperation for development and global partnership, which mainly referred to an assistance program of cooperation existing among States.

The Speaker concluded his introduction by asserting that the ILC Draft Articles and the Sendai Framework, in the light of their complementarity, could be considered as a coherent whole: the former helped in stating and defining the existence of some international obligations to reduce disaster risk while the latter articulated the specific content of such obligations. Such synergy seemed to reflect the views expressed by many countries during the negotiations of the Sendai Framework, which noted the need for a stronger normative framework rather than just statements
made in support of the need to reduce risks. For those reasons, in the view of the Speaker, the possibility of the Draft Articles becoming a legally binding text was desirable, considering that it would strengthen such positive mutual relationship.

GENERAL DEBATE

The participants welcomed the comparative analysis with the Sendai process and outcome that characterized the introductory remarks, considering it relevant and helpful, particularly for the second reading of the Draft Articles. The late inclusion of the two provisions in the Project, as well as their wording, was referred to by some of the participants as being an **important and relevant aspect of the current Project**, which clearly fit with the recent evolution in analysis dealing with disasters. In particular they also permitted a partial shift in the focus of the Draft Articles which were mainly focused on international response and protection issues.

Concerning the **content of the relevant draft articles**, while a **general support** for the current wording was expressed, reference was made to some issues.

First, concerning the wording of draft article 11, one participant observed that in the domain of disaster risk reduction the ILC had chosen to provide **specific details on measures** that States were expected to adopt at the domestic level, whereas this had not been the case in relation to other areas, such as protection of persons, where relevant provisions had been drafted in broad terms. In that regard, after making reference to the Commentary to draft article 11 which explained in detail the measures that States had to take domestically to reduce the risk of disasters, another participant emphasized that in some areas, as provided by the WHO International Health Regulations system, it was very difficult to disentangle domestic obligations, for example measures of surveillance, from international ones. As an example, the International Health Regulations merged the two elements. The duty of States to perform surveillance activities on health events which were taking place in their territories was not a self-contained obligation only relevant at the domestic level, but was also an instrumental measure in order to notify and report health emergencies events to other States and the WHO. As a consequence, it was proposed that the Commentary to draft article 11 include some references to the potential international dimension of disaster risk reduction activities which was inextricably linked with domestic obligations in the area.

Concerning the content of the provisions, one participant noted how the notions of *“risk assessment”* and *“early warning system”*, discussed in paragraphs (20) and (22), respectively, of the Commentary, could be considered as being too narrow. In the first case, risk assessment had been figured out as a measure aimed at generating knowledge and, consequently, it was mainly limited to risk identification. Such notion could be enlarged, in order to extend its meaning to a critical and context-based analysis of risks, combined with the analysis of the capacity of a system to respond to risks and, implicitly, also to vulnerabilities of a State. In the second case, “early warning systems” were qualified in the Commentary in terms of “plans”. Nonetheless, in some cases, such as epidemic preventions, early warning systems had to also include material elements, such as infrastructures like laboratories and specialized categories of medical personnel to be deployed. It was suggested that the text of the Commentary could also capture such scenarios.

Furthermore, it observed that the **Sendai Framework** had brought forward the definition of **risk**, articulating it as the result of exposure, vulnerability and hazard characteristics — the last aspect being particularly important in relation to man-made hazards – and had established that the reduction of risks could be achieved through one or more of those three components. The view was
expressed that this could constitute further support for the work of the Commission, and for future reflections on the content of the relevant draft articles and their Commentary.

Another participant focused on the concept of ‘prevention’, which was considered as the underlying issue of the two draft articles. In his view, it seemed that the content of the provisions was based on a due diligence obligation to prevent, which was quite common in the field of environmental law and human rights law, being the latter a part of the discussion within the Project. The existence of different standards of behaviour was stressed, as there existed different situations throughout the globe and not all capacities for States to act in terms of prevention were equal. It was recalled that a due diligence obligation to prevent entailed the element of knowledge and the element of capacity. Both those aspects seemed to have been properly evaluated by the ILC, even if in a manner less than well balanced. As regards knowledge, or in other terms the fact that the State knew or should have known, risk assessment was part of that element, which was clearly mentioned within the text. On the contrary, the issue of capacity did not seem completely developed since the measures listed in draft article 11 were more related to issues of collection and risk assessment and less on preparedness.

Concerning risk reduction another suggestion was the possibility of focusing on the notions of ‘vulnerability’ and ‘resilience’ which had gained increasing recognition. Similarly the link between disaster management and development, with particular reference to underdevelopment, could be explored by the Commission. Such latter aspect, in the view of one of the participants, could not be considered as completely distinct. In fact, in the humanitarian system, the continuum between disaster relief and development, and so the dynamics by which a disaster affected the development cycle, has been analysed for many years.

With regard to the relationship of the draft articles under discussion with other provisions, one participant focused on the joint evaluation of draft articles 10 and 11, with draft article 3 on the definition of disaster. It was observed that according to draft article 3 a disaster existed only in case of events seriously disrupting the functioning of society. That element could lead to a paradoxical interpretation according to which a State would fulfil its duties on risk reduction simply by avoiding the occurrence of such a disruption. It was further noted that the Commentary to draft article 11, in retracing the origins of the duty to reduce the risk of disaster, mentioned some practice of the European Court of Human Rights which, for the small-scale nature of the event concerned, surely did not fit in the definition of disaster provided in draft article 3. In a similar vein according to another participant draft article 3 established that neither the imminent disasters nor potential disasters were relevant thresholds for the applicability of the Draft Articles.

Another comment concerned the lack of a definition of “risk reduction” within draft article 4. This was actually proposed by the Special Rapporteur, but the Commission did not support the idea of having such a definition in the “use of terms”. One of the participants wondered then if such aspect could be reconsidered during the second reading, as it could offer a good opportunity to clarify some aspects related to the content of other relevant instruments, that were not spelled out in the Commentary.

Finally it was noted that, even if a group of States had expressed their intention to strengthen the legal framework for disaster risk reduction during the Sendai process, some of the States that had commented on the current wording of draft articles 10 and 11 within the Sixth Committee of the UN General Assembly had been quite sceptical about the possibility of establishing a legal duty in the risk reduction domain. An analysis of comments made by States on the entire set of Draft Articles adopted on first reading could be helpful to highlight the current trends in that area.
Draft Article 12 [9]

Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

INTRODUCTION

The Speaker, in presenting on draft article 12, departed from the analysis of its first paragraph by suggesting that in order to grasp best its content and meaning it was useful to compare the first reading version with that initially proposed by the Special Rapporteur. Whereas the first reading text emphasized that States had a ‘duty’ to ensure the protection of persons affected by disasters, the Special Rapporteur’s proposal had placed upon States the “primary responsibility for the protection of persons and provision of humanitarian assistance on its territory” (emphasis added). According to the Speaker, both versions had some strengths and weaknesses.

The main strength of the initial version proposed by the Special Rapporteur was that it found its inspiration in the language of well-known soft and hard law instruments. As to the former, the Speaker referred in particular to UNGA Resolution 46/182 (1991), the Bruges Resolution of the Institute of International Law on humanitarian assistance and the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief. As to hard law instruments dealing with this issue, the wording of the original version of draft article 12(1) was to found in both universal documents – such as the Food Assistance Convention – as well as in regional instruments, such as the SAARC Agreement on Rapid Response to Natural Disasters and the ASEAN Agreement on Disaster Management and Emergency Response and various UNSC resolutions concerning, most recently, the crises in the Democratic Republic of Congo, the Central African Republic, Yemen and Syria.

Moreover, a further strength of the original version came from the fact that the concept of primary responsibility it embedded recognized that affected States did not have the exclusive competence in taking care of victims of disasters, but that the international community had a complementary or subsidiary role to play.

Nonetheless, its main difficulty resided in the different nuances that could be assigned to the notion of primary responsibility under international law. According to the Speaker, it was this concern that had motivated the ILC to modify the formulation of the provision. It might even be argued that the ILC’s fear was that the original version of draft article 12(1) could have been interpreted as evoking the R2P doctrine.

The end result was the first reading version of draft article 12(1). According to the Speaker, that version showed great potential as it directly pointed to the focus on the protection of persons in the event of disasters. The obligation embedded in draft article 12(1) was one of result – according to the Speaker, in stark contrast with the duty of States to cooperate, to seek assistance and to refrain from arbitrarily withholding consent.
At the same time though, the scope and the limits of such a duty were not clarified by the article. Moreover, the term “duty” (“devoir” in the French version), was not devoid of ambiguity and was capable of bearing either the meaning of an all-encompassing legally binding obligation or one of a mere political or moral engagement. In that regard, the Speaker maintained that it was not by chance that the affirmation of a duty to protect was contained in the Ethical Principles on Disaster Risk Reduction and People’s Resilience to Disasters adopted by the Council of Europe in 2011. The Speaker in that regard underlined that a certain ambiguity might also be due to the fact that, in the version adopted on first reading, the duty to protect had been derived from the principle of sovereignty (which found its consecration in this article), and that the adjective “primary” had been deleted.

The Speaker affirmed that such potential ambiguities surrounding the term “duty” led to the restrictive reading of the provision by some States, some of which affirmed that draft article 12(1) would reflect the existence not just of a duty but of a right – or, better, of an exclusive competence – of the affected State to take care of the victims of disasters. In that regard, the Speaker found that a certain support from the mentioned restrictive interpretation might be identified in the Commentary, which referred to a very traditional notion of sovereignty rather than to its dual modern reading.

A further issue identified by the Speaker lay in the absence of any reference both in the text and in the Commentary to the case of disintegration of governmental authority. The Bruges resolution mentioned above went, for instance, in the opposite direction and includes in its art. III(2) the provision that “(a)ny other authority exercising jurisdiction or de facto control over the victims of a disaster (for example in case of disintegration of the governmental authority) had the duty to provide them with the necessary humanitarian assistance, and also had all the other duties and rights of the affected State provided for in the Resolution”.

Regarding draft article 12(2), the Speaker considered its content to be much less problematic. It was worth noting that the use of the term ‘role’ rather than of the term ‘responsibility’ followed the same logic described above. Generally speaking, the primacy that draft article 12(2) granted to the affected State followed from the uncontested acknowledgment that national authorities would be best placed to frame the disaster response, as recognized in a plethora of international agreements which most frequently referred to “overall” direction, control coordination and supervision - sometimes with the caveat “unless otherwise agreed”. At the same time, though, the use of the term ‘role’ would accord States a certain flexibility in deciding to be only partially involved in the operational aspects of disaster response.

General Debate

Three main themes emerged from the discussion on draft article 12. At the outset, participants’ comments focused on definitions. Next, they debated the provision’s scope of application. Lastly, concerns regarding the possibility of linking draft article 12 with the doctrine of R2P were raised.

As to the issue of definitions, one participant indicated that draft article 12(1) was the only provision within the Draft Articles, apart from draft article 1, which specifically dealt with the protection of persons during disasters. As a definition of the notion of ‘protection of persons’ was absent from the Draft Articles, it was suggested that the inclusion within the Project of a provision elaborating on such notion could be useful. It was furthermore proposed that some inspiration to craft such a definition might come from the Guiding Principles on Internal Displacement. Little assistance could
indeed come from the definition of ‘protection’ under international humanitarian law and human rights law for they enjoyed a different aim and scope of application vis-à-vis the Draft Articles. On the contrary, a strong connection existed between the type of protection envisaged under international disaster law and the protection accorded to displaced persons under the mentioned Guiding Principles. The protection envisaged by the latter covered the full cycle of displacement: similarly, protection under the Draft Articles could include all phases of the disaster cycle - i.e. from disaster risk reduction to recovery.

Second, a minor change in the language used in the title of the draft article was suggested. It was suggested that the current formulation of the title, which referred to the “role” of the affected State, might not be capable of capturing the totality of topics covered by the article. Draft article 12(1) referred also to the ‘duties’ incumbent upon the territorial State. Accordingly, the title needed to reflect both aspects.

Third, a participant commented upon the definition of the affected State. He identified what could be a discrepancy between the definition of affected State offered by draft article 12 and the definition found in draft article 4 subparagraph (a) which defined such State as the “State in the territory or otherwise under the jurisdiction or control of which” a disaster occurs. Draft article 12, on the other hand, referred to sovereignty. The difference between the two approaches could create difficulties when it came to delineating the objective scope of application of the Draft Articles: there were indeed various situations in which a State exercised effective control over a territory but did not enjoy sovereignty over it. Furthermore, one could argue that the obligation under draft article 12 could turn into an indirect recognition of title over a territory. In order to avoid such potential controversies, coherence among the two definitions had to be enhanced. Still, a problem remained with regard to the applicability of the Draft Articles to those territories that claimed to be a State but were not recognized as such.

Fourth, some participants focused on the notions of “direction, control, coordination and supervision”. Although the use of such expressions was widespread in international practice concerning disaster law and therefore reflected a general consensus, some participants nonetheless felt the provision might be too broad. In particular, it was maintained that compared to similar provisions pertaining to international humanitarian law - which only assigned the territorial State the role of controlling humanitarian activities - draft article 12 was possibly too intrusive vis-à-vis the operations carried out by impartial humanitarian organizations in situations of complex emergencies, by providing States with the possibility of much greater say in the conduct of humanitarian relief operations. A better understanding of the relationship between draft article 12(2) and IHL in cases of complex emergencies was to be welcomed.

Other participants opposed the idea of reducing the extent of the territorial State’s control over assistance, and pointed out that the Draft Articles were crafted having in mind ‘common’ disaster scenarios (i.e. outside situations of complex emergencies) where States’ sovereignty was to be guaranteed and respected. It was noted that draft article 12 reflected a balanced compromise between the purposes of protecting persons affected by disasters and of guaranteeing States’ sovereignty. In a similar vein, some participants noted that draft article 12 conformed with the text of UNGA Resolution 46/182 (1991) which affirmed that States were empowered with the initiation, organization, coordination and implementation of humanitarian assistance. One participant observed in that respect that draft article 12 ought to be seen as embracing a more progressive attitude than UNGA Resolution 46/182 (1991): whereas indeed the latter simply confirms that States’ sovereignty was to be respected, the former established a duty for States to ensure humanitarian assistance.
That debate led participants to a further theme of discussion concerning the **scope of application** of draft article 12 which made reference only to the role of the affected State. Some indeed emphasized that the wording of the provision differed from that of, for instance, the **Bruges Resolution** of the Institute de Droit International, which provided that whomever **exercised jurisdiction or de facto authority** over the persons affected by a disaster had to provide them with the necessary humanitarian assistance. Although similar situations might not arise in ‘common’ disaster scenarios, they might occur during complex emergencies or when there was not a recognized armed conflict. As noted by one participant, pursuant to the letter of draft article 21, the application of the Draft Articles was not excluded when there was an armed conflict, but rather when IHL applied. It was suggested that additional discussion of the policy considerations regarding the extent of the territorial State control over external assistance was necessary.

A third area of comments concerned the relationship between draft article 12 and the **doctrine of Responsibility to Protect (R2P)**. Although neither of the reports submitted by the Special Rapporteur nor the ILC ever said that R2P would be applicable in case of disasters, nonetheless some participants recalled that the original **2000 ICISS Report** mentioned disasters along with other situations in which the R2P might be invoked. Moreover, it was underlined that the Draft Articles and R2P operated in the same context, i.e. they were called into action when the protection of persons exceeded the affected State’s internal capacity. Furthermore, some participants pointed out that draft article 12(1)’s wording could be given the interpretation of establishing States’ responsibility to protect their own population: some participants perceived that the expression ‘by virtue of sovereignty’ seemed to entail that.

Against that interpretation, **participants agreed that R2P features should not permeate the Draft Articles**. Some proposals were accordingly put forward in order to avoid any such interpretation of draft article 12(1). First, it was suggested to erase the reference to the notion of sovereignty, also taking into account that reference made in the Commentary to the opinion of Judge Alvarez in the **Corfu Channel** case was not totally persuasive in this regard. On the other hand, it was suggested it be affirmed that States had a duty to ensure the protection of persons affected by disasters “by virtue of international law”. Other participants suggested not changing the text of draft article 12(1), but rather specifying in the Commentary that the notion of sovereignty embraced by that provision was not to be interpreted in some ‘modern’ sense, but rather had to be linked to the protection of persons’ human rights and human dignity. In that sense, it would suffice to introduce within the Commentary a connection between draft article 12 and draft articles 5 and 6.
Draft Article 13 [10]

Duty of the affected State to seek external assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

INTRODUCTION

The Speaker focused his comments on five dimensions of draft article 13, concerning, respectively: the qualification of a given situation as falling within the definition of disaster under the Draft Articles; the moment in which the duty to seek assistance should be deemed triggered; the definition of the obligation arising from the provision at hand; the objective of seeking assistance; and the possibility that draft article 13 could embrace an implicit request of assistance.

As to the first issue it was maintained that according to the wording of draft article 13 the duty to seek assistance was triggered by the existence of a disaster: therefore, draft article 13 was to be read together with draft article 4. Two elements worthy of analysis emerged from a contextual reading of the two provisions. First, the duty provided under draft article 13 seemed to be excluded vis-à-vis incremental disruptions of the functioning of the society – which did not fall within the definition of disaster provided for by draft article 4, according to which a disaster was deemed a discrete event that occurred at a given moment in time. Second, the existence of a disaster could be read as being self-judging by the affected State – i.e. the affected State seemed to be the only (or at least the principal) actor in establishing the existence of a disaster. According to the Speaker, it could be useful to include within the Draft Articles the principle of subsidiarity in establishing whether a given disruption of the functioning of the society due to a calamitous event amounted to a disaster.

As to the second issue (i.e. the moment in which the duty to seek assistance should be deemed triggered), the Speaker suggested that it could be useful to provide guidance as to how to understand when the national response capacity of the affected State was exceeded. In that respect the Speaker made two proposals.

First, he recommended to interpret functionally the notion of response capacity. The notion of response capacity could thus be linked to a given aspect of the society disrupted by the disaster. In other words, the response capacity of the affected State could be considered as exceeded even though the State possessed the capacity to generally react to a disaster, but at the same time lacked the capacity to answer a specific need: this could be the case of a State with an appropriate capacity of response to flooding but with a limited capacity to react to the medical dimensions of the flood, or to provide shelter to a specific group of its population. Second, the Speaker suggested unpacking the notion of response capacity in reference to specific dimensions of disaster response. The Speaker underlined that again the wording of draft article 13 seemed to suggest that the decision regarding whether the national response capacity had been exceeded was self-judging on the part of the affected State.

As to the third issue (i.e. the definition of the obligation arising from the provision at hand), draft article 13 created a specific legal obligation, which possessed five central characteristics. First, it
was an independent primary obligation under international law: i.e. it was not a means for the affected State to fulfil other existing obligations under international law — e.g. obligations arising from international human rights law. Second, it possessed both a horizontal and a vertical effect: as to the former, it created international legal obligations for States to seek assistance from other States; as to the latter, it seemed to create a vertical obligation upon the affected State towards its own citizens to seek assistance from third States. Third, the obligation stemming from draft article 13 had both a positive and a negative underpinning: it was positive in so far as it obliged States to seek assistance from third States; it was also negative in so far as it could imply the obligation not to hinder individuals from seeking the assistance of third States as a way of fulfilling the general obligation of the territorial State to seek assistance. Lastly, the Speaker qualified the obligation at hand as one of conduct, rather than of result: accordingly, the duty was not to be interpreted as one to obtain assistance, but rather to employ reasonable diligence in seeking it.

As to the fourth issue (i.e. the objective of seeking assistance), the Speaker maintained that the duty to seek assistance ought to be read in light of the Draft Articles object and purpose to protect the persons affected by a disaster. Accordingly, it was not to be understood as implying the duty to achieve other goals, such as security or economic development.

Lastly, the Speaker discussed whether draft article 13 could be read as encompassing the possibility for an implicit request of assistance. Whereas it was clear that the two elements of the request and consent of assistance were required under the provision at hand, it was unclear whether an implicit request might exist. According to the Speaker it could be useful to clarify this question and, if the answer was in the positive, to consider also the conditions under which such an implicit request could be envisaged.

**GENERAL DEBATE**

The comments concerning draft article 13 focused on three main aspects introduced by the Speaker. First, participants held a discussion on the criteria in order to establish whether the internal capacity of States affected by disasters was exceeded. Second, participants discussed the very nature of the duty to seek assistance embraced by draft article 13, and whether it constituted an international custom or not. Third, participants discussed the contours of the duty to seek assistance.

Regarding the first issue, participants discussed whether draft article 13 envisaged self-determination by the affected State in assessing whether the disaster exceeded its response capacity and the appropriateness of such a solution, vis-à-vis the observation that the wording of draft article 13 seemed to suggest that. Participants pointed out in that regard some policy and law-making considerations.

First, some participants suggested that the general principle of good faith in executing international treaties could step in to assess the action or inaction of the affected State under such provision. This position was opposed by some participants who maintained that to include a good faith clause within the Draft Articles would run counter to the possibility of the being translated into a treaty as it might be prospectively difficult to negotiate with States the inclusion of a similar clause.

Second, some participants felt that if the Draft Articles were to end up in a binding text, then a non-self-determinative objective test had to be developed. Mention was made to the potential role played by humanitarian branches of International Organizations in such evaluation as in some cases they could be in a better position than the affected State to make such an assessment because they
were on the ground and had the technical capacity and expertise to supplement the analysis of the affected State. Some participants suggested that rather than a good faith clause, one could make reference to the definition of disaster and use the criteria embraced therein (in the particular the functioning of the society criterion) to assess under what conditions the potential threshold for the affected State to seek could be particularly relevant in situations in which a disaster destroyed the political and administrative apparatus of the affected State to the extent that no authority would be able to make a capacity assessment. On that point the debate concerned specifically whether there was room for the ILC to progressively argue for an implicit request or implicit acceptance of international assistance by the affected State in some extreme cases, such as of a small island affected by a wide scale disaster which broke the lines of communication in the early days after the event. Some participants suggested that, if no implicit acceptance clause was eventually included in draft article 13, there was still room to claim that the draft article could stimulate and encourage States to negotiate bilateral assistance agreements which could include the possibility of being applied automatically should a disaster struck one of the Parties.

As to the question regarding the extent to which the duty to seek assistance embedded by draft article 13 codified the state of general international law or rather constitutes progressive development, some participants pointed out that the Commentary to the said provision itself at paragraph (1) provided conclusive proof of the fact that a debate exists on that very point. The Commentary was not decisive in one sense or another.

Some participants believed that draft article 13 constituted progressive development of international law. It was maintained that for the ILC to say that draft article 13 was progressive development, would be a positive decision to make as, traditionally, it meant something positive – i.e., to push the law forward. Other participants adopted a more nuanced approach as draft article 13 could constitute a progressive interpretation of existing obligations under international law. In particular, it could be qualified as a specification of the duty to cooperate. In that regard the Commentary’s reference to General Comment 12 of the Committee on Economic, Social and Cultural Rights on the right to adequate food, where the Committee held that States had the obligation to take steps to achieve progressively the full realization of that right, could be considered as embracing such viewpoint.

That discussion led the participants to debate on the contour of the duty to seek assistance. First, participants discussed to whom the obligation was owed: whether to third party States, or to individuals under the State jurisdiction etc. Should the answer be in the positive for the former alternative, then some participants suggested that the Commentary ought to elaborate on the legal relationship emerging from the exchange of requests and offers of assistance, whether contractual or not. In a similar vein, one participant discussed the legal consequences that might arise from a violation of draft article 13 - in particular, whether the international responsibility of the affected State might be engaged. Participants seemed to agree that rather than focusing on the possibility of enforcing draft article 13 it would be better to emphasize its potential positive role. In particular such a provision could be a relevant tool for humanitarian organizations during negotiations with States in relation to access to the territory affected by a disaster, thus conceiving draft article 13 as setting a standard of action as opposed to establishing obligations to be asserted before international tribunals.

Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.
   Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

INTRODUCTION

The Speaker commenced his presentation by emphasising that draft article 14 was to be acknowledged as an important contribution to international disaster law. By way of introduction, he suggested reading the first two paragraphs of the provision together, as they were closely related and came as a package. He also underlined his concerns on draft article 14 regarding what the provision did not include, rather than what it explicitly provided for.

During his presentation the Speaker focused his attention on some main issues: the moment in time in which consent had to be expressed by the affected State under draft article 12(1); the extent to which the standard of arbitrarily withholding of consent envisaged by draft article 12(2) crystallizes general international law; the notion of ‘arbitrarily’; the requirement for the affected State to provide a reason for the refusal under draft article 12(3); and the selection of the entity in charge of assessing whether the withholding of consent was arbitrary or not.

As to the first issue, the Speaker generally confirmed that draft article 12(1) had to be interpreted in the sense that consent had to be expressed before external humanitarian assistance was provided, as per the sovereignty principle; the rationale of prior consent also enjoyed a practical value, as the arrival of external actors and their goods and equipment had to be logistically organized.

As to the second issue, the Speaker discussed the notion of arbitrary withholding of consent and the extent to which such standard corresponded to general international law. First, he underlined that according to the Commentary to the provision at hand no consensus within the ILC arose as to whether the standard of ‘arbitrarily’ would be generally recognized under international law. Second, he recalled that the opinions of States in the Sixth Committee had been mixed on that point. Third, he recognized that no binding general international instrument existed that described withholding consent identically to draft article 14. Notwithstanding those three elements, he suggested that at least three arguments supported the standard of ‘arbitrarily’ embraced by draft article 14.

First, the International Covenant on Economic, Social and Cultural Rights required States to take steps, individually and through international assistance and cooperation, to the maximum of their available resources, to progressively realize economic, social and cultural rights: this implied a duty to not arbitrarily withhold consent vis-à-vis offers of external humanitarian assistance. Second, draft article 12 concerning the duty of the State to ensure the protection of the persons affected by the disaster corroborates the former element. Lastly, an analysis of international disaster law instruments - in particular soft law instruments such as the Guiding Principles on Internal
Displacement - supported the same conclusion. According to the Speaker, it was unfortunate that the Commentary had not mentioned those elements - not even the ICESCR: at least for States parties to this Covenant a reference to it was important.

As to the third issue, the Speaker noted that it would be helpful to elaborate further in the Commentary on what was meant by arbitrary withholding of consent, although a case-by-case approach had to be accepted. He pointed out that a number of States had queried its meaning in the Sixth Committee of the UNGA. He affirmed that the term ‘arbitrarily’ could be broadly interpreted. Thus ‘arbitrarily’ might be understood as unreasonable, or unjustified withholding of consent.

As to the fourth issue, the Speaker maintained that the formulation of draft article 14(3) and its Commentary minimized the requirement for States to provide a reasoning for their refusal to consent. He was of the view that the Commentary was construed in somewhat unclear terms: on the one hand, the Commentary noted that affected States were merely ‘encouraged’ to give reasons not to consent; on the other, it added that “the absence of a reason may act to support an inference that the withholding of consent [was] arbitrary”. This latter element suggested that a reason ought to be given by the State withholding its consent. According to the Speaker, the requirement to offer a reason for withholding would follow on from the standard itself: it would indeed not be practicable to assess whether the non-consent was arbitrary if no reason was provided. The Speaker observed that the position taken in the Commentary seemed to have retreated from that set out in the Report of the Special Rapporteur - which, according to the Speaker, reflected a better approach.

Lastly, the Speaker noted that the Commentary was silent on the issue of which entity was to assess whether a withholding of consent was arbitrary or not. He maintained that that question was crucial – and suggested that, although in principal each actor offering assistance (States, International Organizations, non-governmental organizations) should be allowed to make that assessment itself, that could lead to a chaotic situation: rather, a better approach was to identify a central decision-making body.

**GENERAL DEBATE**

The participants’ discussion on draft article 14 concerned four different issues mainly related to draft article 14(2) – namely: (i) the extent to which draft article 14 crystallized general international law; (ii) the notion of arbitrarily withholding of consent and law-making policy considerations regarding draft article 14(2); (iii) the possible legal consequences arising from the violation of draft article 14(2); (iv) the possibility of attributing to a central decision-making body the authority of assessing whether a withholding of consent was arbitrary or not.

First, participants discussed the extent to which draft article 14 reflected general international law. As far as draft article 14(1) was concerned, most of them agreed that it constituted customary law taking into account traditional sovereignty concerns. Moreover, it was suggested that the ILC could have also articulated that element drawing upon its previous work on the notion of consent in the area of responsibility of States – according to which consent in order to be valid under general international law had to be clearly established, provided by organs of the concerned State authorized to do so on behalf of the State and expressed. Conversely, some participants were of the view that draft article 14(2) did not constitute customary law but rather the progressive development of international law. In particular, it was maintained that the standard contained therein was not precisely defined in public international law. On a similar line, others suggested that
the Commentary ought to specify that such standard corresponded to progressive development of international law.

The discussion led participants to debate the definition of arbitrary withholding of consent ex draft article 14(2) and on the appropriateness of its inclusion within the Draft Articles.

Some recalled that that notion, while not expressed in treaty provisions, was now quite familiar in international law debates and originated from the Guiding Principles on Internal Displacement and was afterwards employed in other contexts such as the resolution on humanitarian assistance adopted by the Institute of Humanitarian Law in 2003 and in the UNSC’s practice. It was further underlined that the delineation of such definition by the Commission ought to be done taking into consideration contemporary efforts towards the definition of a similar notion in IHL contexts in order to avoid fragmentation, such as initiatives promoted by OCHA on humanitarian relief operations. In that regard it was proposed that the Commentary include additional criteria to facilitate the interpretation of the concept, notwithstanding the fact that the first reading Commentary already provided some helpful insights in that regard.

From a law-making policy perspective, some experts affirmed the positive value such a provision could have in the Project especially in order to better address, also from a legal perspective, some extreme scenarios where States might be reluctant to guarantee access to victims of disasters. In such situations the possibility for independent humanitarian organizations and assisting States to rely on draft article 14(2) in order to argue that they should have the possibility of providing assistance was qualified by some participants as a potentially useful tool, even if according to one participant such notion was closer to a social sanction rather than a legal one. Furthermore one participant believed that draft article 14 was fundamental as it conveyed the idea that consent could be legally withheld in order to selectively and effectively accept external assistance. In fact there had been examples where external offers of assistance had not met the needs of the affected State and in such contexts draft article 14 could represent a limit to similar situations. Finally one participant maintained that the provision introduced balance into the Project which was primarily state-centered. He observed further that draft article 14(2) reflected a human rights oriented approach whereas draft article 14(1) reflected an inter-State approach, and that that justified the different content of the two paragraphs.

Conversely another participant maintained that the qualification of consent as ‘arbitrarily’ withholding could hardly represent a significant added value for humanitarian actors in negotiating access into the territory of the affected State, as the final decision by the affected State could be driven mainly by non-legal evaluations. Similarly one participant underlined that according to his opinion in case the provision was not included in the text to be adopted on second reading such outcome would not modify the current state of international law. Such an alternative solution could not be interpreted as providing States with the possibility of denying arbitrarily their consent. As a result should draft article 14(2) be deleted on second reading, the provision would continue to be interpreted as implicitly encompassing the notion of arbitrary withhold of consent. However other participants emphasized the risk of such an implicit approach as an express deletion of draft article 14(2) on second reading could conversely be interpreted as the evidence that there was no such standard in international law.

In relation to draft article 14(2) some participants focused their attention on its human rights oriented approach and along this line it was claimed that the Project ought to provide a link between the primary obligations of States to address the basic needs of the individuals under their jurisdiction and the obligation to consent to external humanitarian assistance. Support was expressed for the possibility of the Commission relying on the ICESCR and relevant practice in order
to support the notion of arbitrary denial of consent. In that regard it was for instance maintained that the Commentary ought to state that denial of consent was arbitrary when through such a decision the affected State failed to fulfill its international law obligations. Mention was made of the possible violation of the prohibition of discrimination, as enshrined in human rights law, as a consequence of such a decision. It was also affirmed that draft article 14(2) contained some echoes of the R2P doctrine.

The discussion led participants to further elaborate on the legal consequences attached to an arbitrary withholding of consent. A participant argued that the standard of ‘arbitrary’ withholding of consent ought to be excluded from draft article 14(2) in order to rule out any room for unilateral interventions by third States, even by the use of force. They recalled that draft article 14(2) was meant to protect State sovereignty and the sovereign equality among States. In particular, it was maintained that it could open the door to a right for third States to intervene unilaterally should the territorial State fail to respect its human rights obligations in case of disaster and at the same time withhold the consent to external assistance. However other participants claimed that nothing in draft article 14 suggested the right for third States to unilaterally intervene by force: the term ‘assistance’ could not be equated to humanitarian intervention. In any case, it was suggested that some more guidance on the notion of assistance within the Commentary would help to avoid similar misunderstandings.

Finally, concerning the suggestion made by the Speaker as to the possibility of attribute to a third body or entity the possibility of evaluating whether a denial of consent should be qualified as an arbitrary one, some sceptical views were expressed as such a solution would be hardly accepted by States. A participant believed that draft article 14(2) ought not be criticized on the basis that no entity was charged with the competence to decide whether a given withholding of consent was arbitrary. This was not the only international law scenario where such a situation occurred, while, on the contrary, similar cases were the very essence of international law.
Draft Article 15 [13]

Conditions on the prevision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

INTRODUCTION

The Speaker introduced his remarks concerning draft article 15 by affirming that the provision was a centrepiece of the Draft Articles: both in relation to the draft articles concerning the duties of the affected State but also concerning the more operational provisions on the facilitation of assistance. The Speaker also briefly described its content and recalled that it addressed the right of affected States to establish conditions on the provision of external assistance on their territory - a right which though was not unbound. Indeed, the conditions were to be determined taking into account the identified needs of the persons affected by the disaster and the quality of assistance. Further, the affected State when requesting assistance was required to indicate its scope and type. Finally, the right at hand had to be exercised in accordance with the context, object and purpose of the Draft Articles and with other applicable rules of international and domestic law. The context against which draft article 15 was to be interpreted was represented by draft articles 12 to 14 which dealt with the role and duties of the affected State as well as draft article 17 on the facilitation of assistance.

In fact, draft article 15 not only furthered the principles laid down in draft article 12 which acknowledges the primary role of the affected State in controlling, supervising and coordinating disaster relief assistance, but also recognized the right of the affected State to deny unwanted or unneeded assistance, and to determine what and when assistance was necessary.

Following this introduction, the Speaker made three main observations: first, the formulation of conditions was an important element in the interpretation of the ‘arbitrarily withholding of consent’ in draft article 14. Second, the formulation of conditions appeared to remain very much in the discretion of the affected State; this raised the question of the effective implementation by a supervisory body. Third, the alignment of national rules was important in order to provide efficient assistance: in that respect, the relationship to draft Article 17 required clarification.

As to the denial of unwanted assistance and to the determination of the necessity of assistance, draft article 15 had to be read together with draft article 14. The latter indicated more precisely the obligation of the affected State not to arbitrarily withhold assistance. Accordingly, the formulation of conditions could contain the justification for refusing assistance or for withholding the consent. The Speaker noted that draft article 15 added an important element to the clarification of the notion of arbitrarily withholding of consent - and the linkage between the two provisions merited being clarified in the Commentary.

As to the discretion enjoyed by States in formulating conditions, draft article 15 set some boundaries: it established that the affected State had to take into account the identified needs of the persons affected by disasters and the quality of assistance in formulating conditions. In that
sense draft article 15 differed from draft article 13, where no limits seemed to be placed on the State’s discretion to assess whether a disaster exceeded its response capacity. Still the Speaker emphasised that the notion of conditions remained partly vague for three reasons. First, the obligation to “take into account” was not a very strong one. The Speaker here suggested that the wording of the provision could be modified as to require the conditions to ‘veritably reflect’ the needs of the persons in need. Second, it was unclear what could happen in a situation where the affected State had collapsed and no authority could formulate conditions. Lastly, the Speaker maintained that the question pointed to the need for an implementing body to ensure consistency among different situations.

As to that latter element, the European Union Civil Protection Mechanism, which had been operational since 2013, could be of some guidance. Although the system was triggered upon a request of a Member State of the European Union or of any other third country, prior to the actual request preliminary contacts were made between States and the European Commission in order to facilitate the definition of needs and the response capacity needed. Within the European Union, the prominent role of the Commission vis-à-vis disasters was made possible by the principle of solidarity embraced in article 222 of the Treaty on the Functioning of the European Union. Against that background, the Speaker suggested that a principle as strong as the solidarity one could be inserted within the Draft Articles in order to allow for their efficient implementation and enforcement.

As to the limits for formulating conditions, the second sentence of draft article 15 placed limits on the affected States’ right to condition assistance, which had to be exercised in accordance “with the present draft articles, applicable rules of international law and the national laws of the affected State”. Two elements were relevant in that respect.

First, the Speaker noted that the ILC included the link to the “present draft articles” to stress that all conditions had to be consonant with the principles reflected in the Draft Articles in order to avoid duplications; most notably to ensure respect for the general humanitarian principles (principles of humanity, neutrality, impartiality and non-discrimination) as enshrined in draft article 7.

Second, concerning the reference to “national laws”, the Speaker observed that both the affected State and assisting actors had to comply with the applicable rules of national law throughout the duration of the assistance. According to the Speaker, this would also imply that the affected State was under an obligation to inform the assisting actors as to the applicable legal framework.

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**GENERAL DEBATE**

The discussion focused on four main questions, namely: (i) the limitations that could be imposed on conditions that States can place on external assistance; (ii) the relationship between draft article 15 and other provisions of the Project; (iii) the general structure of the provision at hand; (iv) and further themes it might regulate.

As to the first issue, concerning the conditions and the limitations inherent to draft article 15, several questions were raised. First, some participants felt that draft article 15 could be more operationally-driven. A way to achieve this result could be to make reference within the Commentary to soft-law instruments that may offer guidance to States and other assistance actors. In that regard reference was made to some documents qualified as best-practice in the area, such as the IFRC’s IDRL Guidelines, the IASC Guidelines and the Sphere Project.
Further, rather than leaving the affected State the sole role of establishing quality standards, the above mentioned soft-law documents could be used as a harmonization tool for said standards since they were developed at the international level. In such scenarios, furthermore, the risk of developing domestic standards at variance with recognized principles accepted by main humanitarian actors was considered relevant. The Draft Articles, especially in case they were to be presented as a treaty, could be an opportunity to work more deeply on an international system in this area also to create a degree of harmonization at the international level to be respected in providing assistance, especially in order to make them more predictable. It was proposed that draft article 15 include some prior non-mandatory conditions which could encourage States to adopt and implement them at the domestic level, especially before the occurrence of disasters, so as to facilitate a subsequent efficient response.

Also, draft article 15 could establish that conditions were not to be arbitrary or unreasonable: which would also create a link between draft articles 15 and 14.

Second, in general terms, the proposal to add some practical guidelines within draft article 15 was supported by other participants who suggested that it would be beneficial to the Draft Articles to balance reciprocal expectations between the affected State and external entities providing assistance. The affected State needed to guarantee the quality of assistance and its appropriateness, but the identification of quality standards could not be limited to situations when it had been struck by a disaster, i.e. a situation in which it was too late to come up with basic rules to evaluate external assistance. At the same time draft article 15 could require external actors to be more responsible and selective in their activities in order to respond to real exigencies of the affected State and involved communities and not just being driven by their willingness and agendas with the ensuing risk of bottlenecks at entry points.

On a different note, some participants felt that draft article 15 was too deferential to State sovereignty and that more room for external entities’ role should be provided for within it. In particular, it was pointed out that, especially in complex emergencies, there should always be some room for external assistance actors to discuss or negotiate with the affected State the type and scope of humanitarian assistance needed. Moreover, it was observed that although draft article 15 included a caveat establishing that conditions imposed ought to respect applicable rules of international law, some tensions remained when the provision was contextualized with other branches of international law – in particular its interaction with international humanitarian law could be problematic given that this latter body of rules did not include any provision concerning conditions on the provision of assistance. Some participants, however, disagreed with that view, and recalled that outside situations of armed conflict, it might be preferable to have a strong role for the affected State in guaranteeing the quality of assistance.

Concerning the second issue, i.e. the relationship between draft article 15 and other provisions of the Project participants made a series of remarks.

First, it was underlined in general terms that draft article 15 had to be read together with draft articles 17, 18, and 19 along some sort of chronological operational cycle of disasters.

Second, the relationship between draft articles 15 and 17 was discussed. One participant referred to the two provisions as the operational core of the Draft Articles. It was remarked that a possible tension might arise between the two provisions. Some participants suggested that the Commentary could thus include some guidance as to how to reconcile the right of the affected State to put conditions on external assistance with the requirement incumbent upon it to facilitate external assistance as per draft article 17.
Furthermore, participants discussed in depth the portion of draft article 15 which referred to the “needs of persons affected”. It was in that regard that it was suggested that the Commentary establish a link between draft article 15 and draft article 2 in order for the former to refer not only to the needs of persons affected to disasters but also to the rights of individuals under the jurisdiction of the affected State in consonance with the language used in draft article 2. Some participants were of the view that, given the centrality of the requirement, it might necessitate more elaboration. In particular, it could be clarified whether external assisting actors offering their support might be allowed to assess needs by their own, instead of only granting the affected State the right to identify their needs. In a similar vein, it was maintained that on a practical level the provision at hand might also address the fundamental issue of the matching of needs and available assistance – and the role that external assistance actors could in that regard. Those actors indeed usually have a specific expertise in channelling specialized means of assistance towards disaster areas, or even producing soft-law documents setting standards of assistance. It was questioned whether the second sentence of draft article 15, which established that conditions could be placed by the affected State in accordance with “applicable rules of international law”, also captured such soft-law instruments.

Finally, a participant questioned whether draft article 15 had in mind conditions on the grant of consent or conditions as to content. Were the answer to be in the affirmative for the former, then a link had to be provided with draft article 14(2). Another participant mentioned that draft article 15 was more linked with so-called general consent, not to be confused with operational consent linked with some specific operations which was relevant after the broader authorization of a State to operate in its territory had been provided. In relation to the possible link with draft article 14 a participant suggested including in draft article 15 a mention of the need for the affected State not to impose arbitrary or unreasonable conditions.

As to the general structure of draft article 15, some participants suggested that the last sentence of draft article 15 according to which “when formulating conditions, the affected State shall indicate the scope and type of assistance sought” might deserve a separate paragraph, as it did not only apply to the formulation of conditions. Moreover, such a paragraph could refer to conditions other than those put by States on acceptance of assistance: for instance, conditions concerning the maintenance or permanence of assistance; or conditions concerning termination of assistance.

Lastly, some comments focused on themes that were not covered by the current formulation of draft article 15. It was in particular put forward that the provision could address the issue of the possibility of third States getting access to their nationals abroad affected by a disaster. This could either be done by including within draft article 15 a negative obligation upon the affected State not to limit disproportionately the possibility for foreign states having access to their nationals, so as to try to assist them and possibly also to evacuate them if assistance in situ was not possible - or rather to impose within draft article 17 a positive obligation upon the affected State to facilitate the access of the third States to their nationals. The inclusion of a similar provision in either of the two draft articles would be particular helpful to ensure the protection of non-nationals who may be especially vulnerable in a disaster situation, as emphasised by the initiative recently launched by the Governments of the Philippines and the United States, called Migrants in Countries in Crisis. However, regarding that proposal, one participant affirmed that if accepted then references to the impartiality principle and the non-discrimination clause would also have to be made. Such qualifications would be required in order to avoid any conflict with principles concerning humanitarian assistance as, otherwise, some assisting States could be tempted not to take into account the more urgent needs of people located in the affected area in order to give precedence to their own nationals.
As a final remark one participant discussed whether the wording of draft article 15 as it stood would be able to capture the **entire scope** of external assistance as mentioned in the Project or whether it should be rather redrafted in such a manner so as to render it more sensible, in particular to accommodate **disaster risk reduction activities**.
Draft Article 16 [12]
Offers of external assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

INTRODUCTION

The Speaker introduced his remarks by quoting the famous statement made by Emer de Vattel, in 1758, who stressed a State’s obligation to: “save (other Nations) from disaster and ruin, so far as it can do so without running too great risk…if a Nation is suffering from famine, all those who have provisions to spare should assist it in its need, without however, exposing themselves to scarcity…To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolute to do so”.

Nearly 250 years later, General Comment no. 12 of the Economic, Social and Cultural Rights Committee devoted to the right to health reflected Vattel’s statement by highlighting that: “States parties have a joint and individual responsibility, in accordance with the UN Charter and relevant resolutions of the General Assembly…to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities”.

The Speaker observed therefore that the question of whether and how third States could or should assist States facing disasters and ruin had a long provenance.

Likewise, he noted that drawing from international humanitarian law, the role that NGOs played in humanitarian assistance was also well recognized, with Common article 3(2) of the 1949 Geneva Conventions stating that in non-international armed conflicts: “[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”. Moreover, he recalled that the right of initiative was also set out in article 17(1) of Additional Protocol I, which provided that: “The civilian population and aid societies, such as national Red Cross … Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts”. A similar provision was contained in article 18(1) of Additional Protocol II. Article 70(1) of Additional Protocol I further provided that: “Relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts”.

Turning to draft article 16, the Speaker stated that it had the clear rationale of setting out the role of external actors in the provision of humanitarian assistance in disaster settings. Notwithstanding, the issue still deserved attention. The Speaker went therefore on to examine some of the salient points, highlighting areas of on-going dispute – namely, the issues of: the protection of the principles sovereignty and non-interference; the discussion around the right to offer or right to
provide assistance; and whether rights or duties arose from draft article 16. He then concluded his remarks by posing to the audience some questions to consider.

As to the first issue (i.e. the protection of the principles sovereignty and non-interference), the ILC and the Special Rapporteur had tread a delicate balance between State sovereignty, non-interference in the internal affairs of States and the rights of those affected by disasters. While draft articles 12 to 15 set out the internal rights and duties of the affected State, draft article 16 went to the heart of potential limitations of State sovereignty by elaborating the role that external third parties could play in the protection of persons in the event of disasters. The provision at hand, noted the Speaker, was premised on the fact that the international community had an interest in the protection of persons. Such interest entailed two aspects: self-interest and preservation, and a broader motivation of international solidarity and cooperation. As to cooperation in particular which was set out in draft articles 8 and 10, such obligation could vary, depending on the actor and the context in which assistance was being sought and offered.

As to the second issue (i.e. the discussion around the right to offer or right to provide assistance), the Speaker recalled that the Special Rapporteur and the Commentary very clearly and correctly identified that draft article 16 was only based on offers of assistance, not a right to provide assistance. Sovereignty and non-interference were maintained through an affected State’s duty to seek external assistance pursuant to draft article 13 and ability to refuse in accordance with draft article 14. State consent was in that sense central to the Project as a whole. However, the Speaker stated that even if a State had the ability to refuse offers of external assistance, such consent could not be withheld arbitrarily. There was a clear linkage therefore between draft articles 16 and 14, 15. In fact, the Speaker mentioned that both Prof. Alain Pellet and Sir Michael Wood had maintained that logically draft article 16 should come before draft article 14 - as the consent of the affected State could only follow an original offer by external actors. In conclusion, the Speaker argued that, while it was well established that the Draft articles only covered offers of assistance, the question of how those offers were to be dealt with by the affected State remained.

As to the third issue (i.e. whether rights or duties arose from draft article 16), the Speaker noted that whether third parties possessed an obligation or duty to offer their assistance, or whether such terminology was even appropriate in the context of disasters remained one of the key areas of debate. It was noticeable according to the Speaker that the Special Rapporteur’s original proposal had not differentiated between the right to offer for States, the UN, other competent intergovernmental organizations and relevant NGOs. However some States had argued against the need for draft article 16 in the first place as being either superfluous or of no evident independent value. Conversely, it was recalled that other States had maintained that draft article 16 was clearly progressive development of international law and would place the affected State in a defensive position and thereby undermine the principles of consent and sovereignty.

Conclusively, the Speaker raised four questions which still remained to be resolved. First, whether there existed a legal right to offer assistance or whether only a moral duty to do so. A further possibility was that the entire draft article was superfluous. Second, whether the two stage structure of draft article 16 was justified – or whether there existed room to argue that also NGOs had a right to offer assistance – as for instance provided for in the Guiding Principles on Internal Displacement at principle 52(2). He also underlined that there might be no difference in reality between the wording of a “right” for States and “may offer” for NGOs. Moreover, he questioned whether it was appropriate for the ILC to promote policy considerations. Third, he wondered whether the reference in the Commentary to the 1989 Institute of International Law resolution was unnecessarily constraining, and suggested that perhaps the wording of article VI of the 2003
Institute of the International Law resolution on humanitarian assistance was more appropriate, insofar as it provided that: “States and organizations have the right to offer humanitarian assistance to the affected State. Such an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character”.

Fourth, he proposed discussing whether draft article 16 represented a codification or progressive development of international law.

GENERAL DEBATE

Several points were discussed in regard to draft article 16, also drawing from the questions raised by the Speaker. In particular, participants focused on: (i) the location of draft article 16 within the general structure of the Draft Articles; as well as (ii) the right to offer assistance and the two corollaries issues of the identification of entities entitled to exercise such right and its legal consequences. Regarding this latter point, participants also raised the question of whether the term “right” should be used at all. Participants also discussed: the entitlement to receive an offer of assistance; the relationship between draft articles 16 and 14; and the possibility that draft article 16 could also include some guidance concerning the coordination of offers of assistance coming from different actors.

Concerning the location of draft article 16 within the general structure of the Draft Articles, it was suggested that the provision at hand would better fit next to draft articles 8 and 9. The three provisions seemed to have a strong connection as they constituted corollaries or specification of the principle of cooperation. Other participants instead argued that draft article 16 was better positioned next to the draft articles concerning consent and its arbitrary withholding, as it was inherently intertwined with draft article 14.

As far as the right to offer assistance was concerned, the discussion focused on two main issues: first, on the identification of assisting entities entitled to exercise such right; second, on the substance and legal consequences of the provision.

As to the first issue (i.e. the identification of assisting entities entitled to exercise this right), one participant observed that consistency needed to be enhanced between draft articles 16 and 4, subparagraph (c): whereas the latter provision and its Commentary referred to a number of “other assisting actors” (including International Governmental and Non-Governmental Organizations; entities such as the ICRC and the IFRC; or even individuals) the former provisions, dealing with actors entitled to offer external assistance, did not reiterate the same model. One participant suggested that although draft article 16 drew a distinction between States, International Organizations from one side and NGOs on the other side, there was actually no substantive reason why the two groups of entities could not be treated alike. Accordingly, also NGOs would have a right to offer assistance. Contrary to that position, one participant stated that not all actors were on the same foot under international law, especially when the principle of sovereignty was concerned: indeed only States and International Organizations could be responsible for unfriendly acts against a State, whereas the same could not be said for NGOs. On a similar note, it was maintained that the formulation of draft article 16 was clear enough to demonstrate that the ILC did not mean States and International Organizations from one side and NGOs from the other to be equal vis-à-vis the right to offer assistance.

According to one participant, such distinction could also underlie a tension between the Draft Articles and international humanitarian law. The latter body of law indeed established that only
impartial humanitarian organizations had the right of initiative which had a specific significance under IHL, whereas other entities, as States and International Organizations, were not privileged under that branch of law, even if they were not prevented from placing their offer of services to the State involved in the armed conflict.

As to the **substance and legal consequences** of the right to offer assistance, several issues were raised.

First of all, some remarks focused on the use of the term ‘right’ in draft article 16. According to one participant when a ‘right’ is provided for, then a corresponding **obligation** had to exist as well. The right to offer assistance envisaged by draft article 16 though seemed not to have a corresponding obligation: the only possible corresponding obligation would indeed entail for the affected State to compulsorily accept the offer of assistance – a solution clearly in violation of the principle of non-intervention – or, to a more limited extent, an obligation to consider offers of assistance. Accordingly, it was suggested that the text of draft article 16 include a more **direct reference** to the fact that offers of assistance could never be considered **unlawful interventions or unfriendly acts**, as evident from the wording of the 1989 resolution of the Institute of International Law referred to in the Commentary or, in even more definite terms, by the Institute’s 2003 Resolution.

At the same time another participant emphasized that the first reading wording could be identified as **an attempt to go beyond issues relating to unfriendly acts and non-intervention**. Furthermore, concerning the debate of ‘obligations versus rights’, one participant emphasized that draft article 16 did not necessarily need to create an obligation but it had an **inherent value**. In particular this provision had to be retained for two reasons: first, in order to make it clear that an offer of assistance did not constitute an unfriendly act; second, because draft article 16 prepared the ground for the draft articles concerning the notion of consent and the arbitrarily withholding of consent. Therefore, a suggestion was made to move it up in order to be located closer to draft article 14.

Furthermore some participants maintained that when it came to International Organizations, it was not always possible to talk about the ‘right’ to offer assistance: in fact, some **International Organizations or their specialized agencies had specific mandates and therefore had no discretion in responding to disasters, but rather an obligation** to do so originating from their functional nature. It was therefore useful to distinguish the situation of States from that of International Organizations. The proposal to avoid the use of the notion of right within draft article 16 was also suggested by other participants who mentioned that the presence of such element created problems in relation to the legal status of **NGOs** and, as a result, the wording of draft article 16 appeared somewhat formalistic as it had been drafted in order to maintain such a distinction among different assisting actors. Finally, it was maintained that although draft article 16 spoke about a ‘right’, the Commentary in paragraph (4) ‘encourage[d]’ States and International Organizations to offer assistance, thereby suggesting the existence of a duty in that sense. It was therefore suggested that possible tensions between the two statements be avoided. Contrary to such position, one participant argued that the two statements were not in conflict, but simply that the tension arose during the discussion within the ILC and in the Sixth Committee, among those who preferred to only have a declaratory right and those who preferred the inclusion of an obligation to offer assistance.

As far as the **entitlement** to receive an offer of assistance was concerned, one participant proposed that draft article 16 allow States, International Organizations and NGOs to address an offer of assistance not only to the affected State, but also to the **affected population** within that State. Framed in such terms, the right to offer assistance would entail a new dimension: the right to offer (not to give) assistance to individuals. In turn, this could trigger positive bottom-up dynamics with the affected State.
Regarding the relationship between the provision and draft article 14, it was underlined that it was characterized in terms of asymmetry. Indeed the latter differed from the former in so far as it did not provide for a right, but rather for a duty to request assistance. In that light, whereas draft article 14 might have been perceived as particularly respectful for the sovereignty principle, draft article 16 seemed to suggest the opposite.

In conclusion, one participant proposed that draft article 16 should also include some elements concerning the practical coordination of assistance as this issue was decisive in offering external assistance. Draft article 16, or other pertinent provisions, could be very helpful in establishing some principles on the division of labour among assistance actors and in imposing a commitment to coordinate.
Draft Article 17 [14]

Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

INTRODUCTION

The Speaker introduced his remarks concerning draft article 17 by recalling its interconnection with draft articles 15, 16, and 18. Taken together, the provisions constituted the operative part of the Project.

He then turned to analyse the aim of draft article 17. He observed that the role of the provision was particularly relevant vis-à-vis the widespread concern among international assisting actors regarding the obstacles usually encountered in disaster scenarios. Also recent disasters had brought to light several difficulties in the facilitation of international assistance, both in relation to the affected State and transit States. On the other side of the coin the recurrent phenomenon of unsolicited relief goods not able to match the needs of the affected State and its population was an additional problematic issue to be addressed. Similar concerns were not new – but rather had been raised since the establishment of the International Relief Union and regulated in a number of soft-law instruments and bilateral and regional agreements aimed at regulating humanitarian assistance.

Against that background, draft article 17 had to be evaluated positively as it took a broad view on the issue of facilitation. Furthermore, the Commentary was particularly relevant as it also made it clear that facilitation was not only a legal issue, but also a policy one. The broad and open approach embraced by the provision was, according to the Speaker, very helpful as real life case scenarios demonstrated that a too strict legalistic approach to facilitation could itself constitute an obstacle to assistance. Also it had to be considered that the face of disasters was continuously changing, and this also favoured a flexible legal approach in regulating facilitation. For instance, international actors currently agreed that the massive movement of goods across borders in the aftermath of a disaster could not any longer be the rule: to the contrary, local reaction, preparedness and also purchasing of local services and goods as well as cash programmes was to be encouraged.

Furthermore an additional positive aspect was provided by draft article 17(2) on the need for the affected State to make its relevant legislation and regulations readily accessible, as this was a recurring problem faced by external actors. The provision could also be interpreted as implying that some domestic regulations concerning facilitation of external assistance had to be present in the affected State.
On a different note, the Speaker suggested that **draft article 17 could be improved**. First, the Speaker underlined that, although the provision was positive in so far as it encouraged States to provide for disaster-related rules meant to facilitate prompt assistance, it could have been further developed in terms of the **technical characteristics** of external assistance, as had been done in some global and regional instruments such as the [Tampere Convention](https://www.cndc.earth). According to the Speaker, not to include within draft article 17 similar **detailed provisions** could constitute a **missed opportunity** for the Project, resulting in the establishment of only a set of **basic operational rules** for the facilitation of external assistance. The current version of draft article 17 was likewise too terse. Instead, the provision could spell out in clear terms some very common operational issues, such as in relation to medication, vehicles, food, telecommunication, moorage and other related bottlenecks in the early chaotic phases of relief activities, as well as registration in the affected country for foreign entities, programs of assistance, etc. **An explicit mention to other relevant issues would be particularly welcomed in this area.** According to the Speaker the focus of draft article 17 was also potentially be too strict as it dealt mainly with the entry of personnel, goods and equipment.

Second, the Speaker emphasized that reference to “relief personnel” and “goods and equipment” in draft article 17 implied that such facilitations needed to be extended to **disaster relief assistance and disaster risk reduction activities** taking into account the meaning of such terms of art. According to the Speaker the special regime envisaged by draft article 17 ought to be limited to the relief recovery phases related to a disaster as their expanded application to disaster risk reduction activities could be perceived by States as being too demanding.

Third, the Speaker maintained that draft article 17 needed also to specify the **characteristics of assisting actors** entitled to provide external assistance and potentially relevant for the application of pertinent facilities, in order for the affected State not to be overwhelmed by the activities of non-relevant and non-professional actors. In that sense, draft article 17 could embrace an **agency-based approach**. Such solution could imply a requirement for assisting actors to comply with pre-arranged quality standards provided by States in order to obtain relevant facilities in case of relief assistance, for instance through a pre-arranged review process managed by national disaster management authorities. Such mechanism could balance both concerns raised by some States on the quality of assistance provided by external actors and the need to act in a proper legal framework for such latter entities. An additional concern raised by the Speaker related to the emphasis provided to **military relief personnel** in draft article 17. Such approach did not appear in line with international standards, such as the Oslo Guidelines.

Finally, it was suggested that the provision could also mention the need for States to adapt their **domestic legal and administrative systems so as to be able to requests for facilitations to be provided to external actors in advance of a disaster**. Such measures were particularly significant for the **preparedness** of a State and were a common feature of international disaster law instruments, such as the ASEAN or the SAARC Treaties.

**GENERAL DEBATE**

The discussion among participants focused in particular on: (i) the possibility of draft article 17 introducing a specific focus in terms of legislative preparedness in order for States to be ready to face legal and operational issues in case of disasters; (ii) further areas of regulation which could be included within draft article 17; and (iii) the relationship between draft article 17 and other provisions of the Draft Articles.
As to the first issue, many participants concurred with the Speaker’s statement that draft article 17 could expand more on legislative and regulatory preparedness. It was emphasized that the possibility of having in place a domestic legal framework in order to accommodate operational and legal issues faced in the event of disasters would largely simplify the problems faced by external actors, thus also permitting the proper protection of victims of disasters.

More specifically, it was proposed that the provision could establish an express commitment incumbent upon States to enact appropriate legislation applicable when disasters struck. The possibility for States to envisage specific pre-arranged provisions to be applied in cases of disaster to facilitate external assistance could avoid the application of standard procedures and regulations more appropriate for everyday situations (and which typically represent a significant hurdle for the prompt and efficient assistance to victims of disasters). Were such aspect included in the text of draft article 17, it could be supplemented by references in the Commentary to relevant international documents addressing different options for States in the area, such as OCHA documents, the 2007 IFRC Guidelines, and the European Union Host Nations Guidelines. In such a manner, even if the Draft Articles could not go in-depth with a set of provisions in the area they could still provide States with appropriate guidelines on solutions to be adopted at the national legal and administrative level, according to internationally recognized standards.

Finally draft article 17 might also mention that such issues could also be solved through international treaties. Mention was made of the vast array of bilateral and regional conventions dealing with the facilitation of external assistance, including those developed by UN bodies or specialized agencies of the UN which had largely facilitated the possibility of claiming such facilities in recent disasters. Such reference would be in line with the supported solution of addressing in a pre-arranged manner facilitation issues involving assisting actors. On a general note, it was suggested that the approach embraced by draft article 17 of requiring States to make their legislation and regulation easily available to external actors, could be applied throughout the entire corpus of the Draft Articles and not only with regard to the issue of facilitation. Such a requirement could also be relevant for the application of other provisions.

Second, several proposals were made as to the areas which draft article 17 could take into account and regulate. First, it was observed that draft article 17 should take also into account the role of assisting States in providing administrative assistance to the affected State, according to an approach which had provided positive results within the concept of the Host Nation Support envisaged by the European Union through its relevant Guidelines. One participant highlighted that draft article 17, or another specific provision, might include rules concerning the role of transit States, which was usually a fundamental issue in real-life scenarios. Further, it was noted that, although the list of equipment and goods provided for under draft article 17(1)(b) was not an exclusive one, nonetheless the provision could expressly include other items which were particularly relevant in times of disaster, in particular in the field of telecommunication. Similarly, licensing requirements for doctor and nurses and issues related to liability, accountability and compensation for damages caused by assisting actors during the relief activities were also mentioned. Concerns as to the need to take into account the problem of corruption was also addressed by one participant.

On a different note, it was proposed that draft article 17 could say something more on the conditions of assistance provided by NGOs, which were usually in the worst position concerning facilitation provided by affected States, notwithstanding the significant support they provided to relief effort. Examples were provided in relation to the most common problems faced by that category of assisting actors, such as tax treatment of relief personnel which might face obstacles
related to double taxation issues, largely depending upon the nationality of the staff member. Further, it was proposed that draft article 17 might also consider the particularities of military relief personnel. It was suggested that the Commentary refer specifically to the Oslo Guidelines. One participant opposed the express distinction made by the provision between military and civilian ones arguing that in relief operations military assets employed were not used in a military fashion. Nonetheless another participant stressed that the delicate legal and policy problems raised by the activities of military personnel in relief activities implied for the Commission the need to pay specific attention to that scenario.

On the third point, i.e. the relationship between draft article 17 and other provisions of the Project, one participant mentioned that the Commentary should provide a cross-reference between draft articles 15 and 17 regarding the possibility for States to waive requirements under national law for the entry of goods, equipment and personnel. Another participant raised the question of the coordination between draft articles 4 and 17 with regard to the employment of military relief personnel. Whereas the former draft article clarified that in principle there was no necessity to differentiate among civilian and military personnel (and this was also reiterated in draft article 18 which did not distinguish among different types of relief personnel), draft article 17 draws such a distinction.

Finally some participants argued that some sort of coordination between the Draft Articles and already existing international coordination mechanisms such as those implemented by OCHA had to be guaranteed. It was suggested that the facilitating role of international organizations be enhanced by specifying the extent of their contribution to the organization of incoming external assistance.
**Draft Article 18**

**Protection of relief personnel, equipment and goods**

*The Affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in the territory for the purpose of providing external assistance.*

**INTRODUCTION**

By way of introduction the Speaker observed that draft article 18 reflected a standard provision in international disaster law instruments as several treaties and soft-law documents included a specific reference to the obligation of the affected State to provide protection for external relief personnel, goods and equipment. This provision was therefore part of the ‘block’ of Draft Articles devoted to the regulation of operational issues to be faced by the affected State and assisting States or other assisting actors (also with a view to balancing their respective roles).

According to the Speaker, draft article 18 encapsulated different exigencies, a characteristic that was underlined during the debates held by States and International Organizations at the Sixth Committee of the UNGA in 2014. The example of the position expressed by the delegation of Tonga (speaking on behalf of the 12 Pacific Small Island Developing States) during those meetings was mentioned. In particular, according to Tonga, draft article 18 could fulfil different purposes as “the protections thereunder were crucial for providing relief to those in need during a natural disaster, and to encourage States and other entities to provide assistance generously”. Also in the Speaker’s opinion a proper fulfilment of the obligation enshrined in draft article 18 could both reduce potential obstacles for the carrying out of activities aimed at giving support to the victims and provide assurances to external actors of the existence of an adequate security framework to perform their assistance activities.

As a consequence it was not surprising for the Speaker that the appropriateness of the provision had been emphasized by several States during past debates in the Sixth Committee of the UNGA. For instance Finland, on behalf of Nordic Countries, had affirmed that “[t]he protection of relief personnel, equipment and goods was an essential condition for any relief operation to be carried out. Draft article 18 rightly set out the obligation for the affected State to take appropriate measures in that respect”. Similarly Singapore “welcomed the inclusion of draft article 18, which tackled an important issue that was provided for in many international and regional treaties, such as the 2005 ASEAN Agreement” and New Zealand expressed “support [for] the inclusion of protection of relief personnel and their equipment in disaster scenarios as an essential condition for any relief operation to be carried out”. Similar positive evaluations of this draft article had also been expressed by Germany, the Netherlands, South Africa, Indonesia, India, and Switzerland.

Then, the Speaker came back to the analysis of the content of draft article 18 and noted that The provision had been worded according to the general terms of other pertinent international provisions (even if such rules did not share the same content) and was based on two axes of pertinent legal obligations.

On the one hand it envisaged an obligation of result aimed at preventing organs of the affected State from being directly involved in pursuing detrimental activities in relation to external relief
personnel and their equipment and goods. That element could be qualified as the negative obligation included in draft article 18. However, according to the Speaker, the potential relevance of that obligation was quite marginal in most situations of disasters.

On the other hand draft article 18 took into account the most common scenario of potential threats against external assisting actors, by non-state actors located in the affected State. Such threats were typically aimed at benefiting from the volatile security conditions created by disasters, in order to obtain illicit gains from criminal activities undertaken against relief personnel and their goods and equipment. Draft article 18 envisaged an obligation of conduct which needed to be fulfilled on the basis of a due diligence standard. That element had also been emphasized in the Commentary where a significant section had been devoted to identifying criteria which could be taken into account in order to evaluate whether an affected State had adopted appropriate measures (e.g. difficulties faced by the affected State when attempting to perform its regular activities; the extent of the resources at its disposal which might have been seriously affected by the disaster; and the attitude of external relief personnel with regard to requests made by the local authorities).

At the same time, although draft article 18 included a generic reference to “relief personnel”, i.e. a category identified in draft article 4 subparagraph (e) as including civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing both disaster relief assistance and disaster risk reduction, measures to be adopted could hardly be the same as for civilian personnel. Furthermore, it could be envisaged that ‘common’ measures required by general international law for the protection of foreigners (such as the existence of security and police services able to maintain law and order in the country and the presence of a judicial system able to avoid denials of justice in cases of harmful acts suffered by foreigners) likely constituted measures required under draft article 18 for the protection of relief personnel involved in disaster risk reduction activities. Nonetheless, the situation of a State affected by a disaster could eventually require different evaluations by involved actors depending on the circumstances prevailing at the time.

The Speaker affirmed that the characteristics of the obligation enshrined in draft article 18 (i.e. an obligation of conduct) brought to light the difficulties inherent in identifying in abstract terms measures to be requested by the affected State to fulfil its duties as they could assume a dynamic character. The envisaged measures to be adopted were highly context-dependent and could hardly be identified in advance in the text of draft article 18 or in its Commentary. Nonetheless, some examples were provided by the Speaker, such as sharing of relevant information on security matters among domestic and international actors and the identification of a focal point in the apparatus of the affected State to deal with such issues. In that regard it was to be expected that comments to be made by States and relevant humanitarian actors on the Project adopted on first reading could eventually permit the Commission to better identify some common practices and procedures in the area, on the basis of their relevant expertise in facing security concerns in situations of disasters.

In the Speaker’s opinion the Commission was rightly deeply concerned with avoiding some potential misunderstanding of the provision, which could eventually be interpreted as imposing severe limitations on the activities of relief personnel in order not to face potential security threats in the territory of the affected State. For instance, significant limitations imposed by local authorities on the possibility of assisting actors accessing affected areas where volatile security conditions were present had to be avoided as far as possible in order not to unnecessarily reduce the capacity to provide assistance to victims. Similarly the Commission had underlined the need to take into account best practices in the area, such as those listed in the 2013 IASC Guidelines on the Use of Armed Escorts for Humanitarian Convoys which sought to limit the possibility of using armed escorts.
for relief operations, in order to avoid that basic principles of humanitarian assistance be jeopardized. It was suggested that the Commentary could also take into account significant practice reflected in international disaster law treaties, such as provisions explicitly mentioning that external relief personnel could not provide security activities for their comrades involved in providing assistance or requiring external relief personnel to act unarmed.

According to the Speaker, such an approach, i.e. including a reference in the Commentary to agreed international standard developed by relevant stakeholders (IOs, States, main NGOs), was appropriate and needed to be adopted by the Commission also in relation to other draft articles. It was clear that, also in view of the technicalities characterizing several issues addressed by the Draft Articles, the Commission benefit from past ‘codifications’ by relevant humanitarian actors in a plethora of soft-law instruments, in order to better interpret the content of relevant draft articles, rather than trying to develop its own standard in the area through a time-consuming process.

GENERAL DEBATE

The discussion on draft article 18 mainly concerned the coordination between the wording of the provision, which required States to “take the appropriate measures to ensure the protection” of external assistance personnel, equipment and goods, and paragraph (4) of the Commentary to the draft article, which required the affected State to “prevent its organs from adversely affecting relief activities. In this case, the obligation [was] one of result”.

It was observed that draft article 18 envisaged two different obligations: that a State had the obligation of conduct of adopting the appropriate measures to ensure that relief personnel, equipment and goods was not endangered by threats posed by non-State actors, as criminal gangs; as well as the obligation of the affected State to obtain the result of preventing its organs from harming external assistance personnel, or damaging their equipment and goods.

According to one participant, both obligations ought to be reflected in the text of draft article 18 for two reasons. First, from a practical viewpoint, organs of the affected State in charge of the protection of external assistance personnel, equipment and goods would rarely take into consideration, or even be aware of, the Commentary. Second, in order to bring the Draft Articles into line with international treaties relevant in cases of complex emergencies. Mention was made to the wording of some international humanitarian law provisions where the two different kinds of obligations were put in clear terms in the same provisions, as provided for instance by art. 71(2) of the 1977 First Protocol Additional to the Geneva Conventions of 12 August 1949 which maintained that personnel participating in relief operations “shall be respected and protected”.

Although sharing the same concerns, other participants noted that the wording of draft article 18 as it stood reflected a constant international practice in the area of disaster law. The ILC Drafting Committee, seized with the proposal to create two distinct paragraphs addressing both limbs of the mentioned obligations, decided not to embrace it, for two main reasons. First, because it felt that draft article 18 needed to adhere as closely as possible to existing practice in the area of disaster law. Nonetheless, the Commission had decided to expressly mention the obligation of result within the Commentary as it was aware of the double nature of obligations enshrined in draft article 18. Second, because in the totality of disaster scenarios, a situation in which States’ organs would put in peril external assistance personnel, equipment and goods was perceived as too remote a possibility to deserve a specific subparagraph in draft article 18, thereby focusing only on the most significant issue.
Draft Article 19 [15]

Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actor wishing to terminate shall provide appropriate notification.

INTRODUCTION

The Speaker presented draft article 19, which concerns the termination of external assistance, as the counterpart to draft article 14 on the commencement of assistance and consent of the affected State. His presentation was mainly focused on the first sentence of draft article 19 which defined the legal background of the decision to terminate the assistance.

In the opinion of the Speaker, the wording of the article could give rise to problematic interpretations, comparable to what has been already pointed out in relation to draft article 14. In particular, the ambiguity could derive from the fact that draft article 19 did not state that, as one could have expected, States could ‘at any time’ terminate external assistance, but rather that the affected State and the assisting actors “shall consult” with respect to the termination of external assistance.

Even if paragraph (2) of the Commentary was clear on such aspect, by stating that “[w]hen an affected State accept[ed] an offer of assistance, it retain[ed] control over the duration for which that assistance will be provided”, that was not considered as being sufficient, since such clarification was not in the text of the draft article itself. This position, furthermore, was also confirmed by relevant practice in the disaster law area where in some international instruments reference was made to the possibility for the requesting State to terminate external assistance at any time, subject to the appropriate notification and consultation. Moreover, as already noted in some comments made by States, such ambiguity derived also from the fact that nothing was said regarding what would happen if the consultations between the parties were not successful.

In the view of the Speaker, the wording of the draft article was not in line with international law standards concerning the issue of ‘consent’. He asserted that under International law external interventions by third States on the territory of a consenting State could only take place within the framework of its consent and only as long as such consent existed. Several principles underpinned that position, starting from the general one volenti non fit iniuria.

It was recalled that that was not the first time that the ILC had addressed the issue of consent. Its longstanding work on that topic was reflected in the codification efforts on the law of international responsibility of States and International Organizations. The ILC had maintained that consent could be invoked as precluding the wrongfulness of an act by another State, and that the only limits were connected with the State expressing the consent in relation to its scope and duration. This solution had been codified in article 20 of the ILC’s Project on responsibility of States for internationally wrongful acts which stated: “[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of this act to the extent of the act remains within the limits of that consent.”
The Speaker made reference to that provision to recall how the ILC always took the position that external assistance intervention on the territory by another State could only be valid as far as the consent existed. In that regard the wording of draft article 19 of the Project could therefore create a problem of internal coherence within the oeuvre of the Commission. The Speaker wondered also why, since the issue of consent had been so relevant for the Project, no references to the previous works of the Commission had been made in the Commentary.

Beyond the ILC’s work, the Speaker observed how the UN’s practice had reaffirmed in several occasions that every State had the right to require the withdrawal of foreign troops stationed - for any reason - in its territory. This was the case, for instance, of article 3, paragraph (e) of UNGA Res. 3314 (1974) on the definition of aggression. Such provision characterized an aggression, inter alia, as “the use of armed forces of a State, within the territory of another State, with the agreement of the receiving State, in contravention of the conditions provided for in the agreement of the receiving State or any extension of their presence in such territory beyond the termination of the agreement”. In other words, the simple presence of foreign troops after the termination of the agreement or a request for a withdrawal was qualified as an aggression. It was also noted that in 2005 the International Court of Justice took the same position in the Democratic Republic of Congo v. Uganda judgement. In that case, the ICJ found that Uganda had violated international law both because its troops did not respect the conditions imposed by the inviting State, the Democratic Republic of Congo, and also because Uganda did not withdraw its troops when requested by Democratic Republic of Congo.

Even if, according to the Speaker, military intervention and the deployment of military assets providing disaster relief could not be totally equated, he explained how, in his view, the dividing line between the two was very thin and could be easily passed, where the aim of providing humanitarian assistance was merged with interests of another nature. Accordingly, the idea of maintaining a state-centred approach was supported, also in order to avoid potential interferences of other doctrines, such as R2P.

Eventually, the Speaker affirmed that in order to accommodate the legitimate concerns of the most relevant NGOs the Project could consider the possibility of expressly differentiating their intervention from the activities of a foreign State, which was much more sensitive.

In addition to the evaluation of the general framework provided by international law, the Speaker next focused his attention on a comparative analysis with other existing instruments in the area of disaster law. In that regard a different formula was usually maintained in those instruments, on the base of which “[t]he requesting State party can terminate at any time external assistance”, adding in several cases the formula “after consultation and by notification”. In the opinion of the Speaker such solution could also be endorsed by the Commission taking into consideration the positions adopted by some States within the 6th Committee of the UNGA.

The introduction ended with a remark concerning the procedural requirement of notification, considered as a relevant condition. In that regard, the position taken by the ILC had been qualified as being correct, as it also avoided any specific procedural constraints like the duty to provide “written notification”. Such choice appeared to accord with international practice as, depending on the circumstances, the notification could be done in any formal – but official and clear – way. This position was affirmed once again by the ICJ in the above-mentioned judgement (Democratic Republic of Congo v. Uganda), in which the Court stated that “consent could be withdrawn at any time by the government of the Democratic Republic of Congo without any formalities being necessary”.

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GENERAL DEBATE

The debate was characterized by the contrast between two main positions: that expressed by several participants who sought to frame the position elaborated by the Commission within its real spirit, i.e. the need to balance the exigencies of State sovereignty with the necessity to involve external actors in the final phases of assistance so as to avoid negative effects on victims of disasters, and that of those who substantially agreed with the observations expressed during the introductory remarks.

The large majority of participants who considered draft article 19 as a good compromise between different exigencies did so on the basis of different arguments.

First it was asserted that the blackletter of draft article 19 did not imply the loss of the State’s ability to decide who could stay and operate on its territory. On the contrary, draft article 19 merely reaffirmed that decisions to terminate external assistance had to be taken after a process of consultation with actors involved in order to minimize potential negative effects for assisted communities. Therefore, the need to strengthen the humanitarian perspective of the provision was emphasized and draft article 19 was considered to be in line with the overall purpose of the Project to protect victims of disasters.

One of the participants was of the view that the formulation of the draft article could even be more centred on the interests of the victims, while still recognizing the inherent right of a State to authorize the presence of external actors on its territory. According to another participant such possibility would link the decision to terminate external assistance to the evaluation of the needs of the victims, and whether an actual response had been provided or not. The participant suggested that such consideration could be added to the Commentary in order to underline the role of victims of disasters in the termination of assistance.

The second rationale offered by those participants who supported draft article 19 referred to its capacity to address a fundamental operational issue through the possibility of dealing with the real dynamics which characterized humanitarian assistance. One of the participants emphasised that during relief operations it could happen that providers of assistance suddenly withdrew their assets and personnel or, more often, that the territorial State unexpectedly decided for whatever reason to expel the international humanitarian actors from its territory with short notice. In other concrete cases decisions to expel international actors were also accompanied by new domestic rules aimed at imposing taxes, other duties and requirements, such as seizure of equipment in order to allow the actors to leave the country. It was observed that the consequences of such actions for the affected population could be extremely deleterious especially in the absence of a proper handoff of responsibilities and tasks to the local government.

Another observation concerned the fact that draft article 19 could also have positive effects for the affected State by preventing an assisting State or other assisting actors from withdrawing unilaterally from the territory of the affected State, which could be considered as a kind of violation of the general principle of good faith. The provision could represent a key solution for those situations in which there existed no internal legislation or international agreements concerning the termination of assistance. In that view, the draft article could be seen as a safeguard provision, to be applied in exceptional circumstances.

Another participant placed particular emphasis on paragraph (6) of the Commentary to the draft article, in which it was explicitly stated that “[e]ven though termination on a mutual basis may not
always be feasible, consultation in relation to the modalities would enable the relevant parties to facilitate an amicable and efficient termination”. He invited participants to give particular attention to the last concept of “efficient termination”, which could be a useful element to clarify the true spirit of the provision also from an operational viewpoint. Draft article 19 had therefore been interpreted as a provision aimed at managing such phase without denying the possibility for States to request termination of assistance.

Another participant observed that draft article 19 had to be read in combination with other provisions of the Project. In particular the provision was described as the counterpart of draft article 17, on the facilitations that should be guaranteed to the external actors and which should be extended also in relation to withdrawal from a country as such event should not happen suddenly and without any consideration of the actors in play.

Finally it was recalled that also in relation to other areas of international law, such as status of forces agreements concerning the deployment of multinational military personnel in peace support operations, a constant trend could be identified whereby sending States were required to duly notify in advance their decision to terminate their presence in the host State. Practice was presented in order to demonstrate that in several cases a prior notification of several months was required by relevant treaties. In that regard, its rationale was identified not only for logistic reasons but also in order to reduce the possibility of falling back into a humanitarian crisis as a consequence of a non-coordinated withdrawn of national contingents.

Finally it was stated that in previous consultations with Governments and other entities in relation to provisions similar to draft article 19, such as in relation to art. 12 of the IFRC’s IDRL Guidelines, there was less criticism. This issue had mainly been qualified by relevant stakeholders as only requiring a proper consultation among involved actors to better arrange external assistance without any prejudice to State sovereignty. In any case some participants emphasized that some elements of the current provisions could be recognized as de lege ferenda elements.

An alternative perspective, in line with the Speaker’s presentation, was held by some participants. For instance, one participant underlined the risk that draft article 19 could be qualified as implying that an assisting State or other assisting actors might maintain their relief personnel in the territory of the affected State in case of failure of the consultation process to be established subsequent to the request to leave. Even if the real rationale for the draft article could be clear for those who participated in the negotiations or examined in detail its elaboration process, it could be the case that in the future a literal interpretation would prevail, leading to the conclusion that, if the local authorities wanted to terminate a relief operation they had to do so on the basis of a pre-existing agreement with the assisting State or other assisting actors, opening the way to the above mentioned risks.

According to that view, a hypothetical scenario that was envisaged concerned the possibility that the misuse of the content and rationale of draft article 19 could constitute an act in violation of article 2(4) of the UN Charter and more generally of the system concerning the prohibition of the use of force. The evolutionary content of the draft article was thus to be seen as a possible cause for negative reactions by some States, which could risk undermining the entire Project.

The wording of the Tampere Convention was quoted by a participant as a better formulated norm, which seemed to reflect the current existing legal standard. Under art. 6 of that Treaty: “[t]he requesting State Party [could] at any time terminate assistance, providing notification. Upon such notification, the State parties shall consult with each other to provide for the proper and the expeditors conclusion of the assistance, bearing in mind the impact of such termination on the risk
of human life and on-going disaster relief operation”. Such formula was considered as a more **balanced** and effective wording to address this issue. On one hand it did not neglect that some consultations had to be held and that considerations on the risk of victims and the impact of such decision on operational issues also needed to be taken into account. On the other hand the Tampere Convention did not put into question the sovereign right of a State to request the withdrawal of external relief personnel.
Draft Article 20
Relationship to special or other rules of international law

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

INTRODUCTION

The Speaker opened his introduction with two preliminary comments regarding draft article 20. The first concerned the temporal phase in which the provision had been adopted. In fact, the original proposal made by the Special Rapporteur, which had been phrased slightly differently, was drafted in the light of what used to be draft article 4 and became draft article 21 on the relationship to international humanitarian law, which somehow subordinated the Draft Articles to IHL in situations of armed conflict. Thus, what was clear to the Special Rapporteur when he worked on draft article 20 was that it had been accepted that the Project was flexible enough to accommodate other branches and rules of international law.

The other premise concerned the fact that, unlike other branches of international law where overarching and comprehensive universal treaties existed in the form of regional or bilateral treaties, in the Disaster Law domain the situation was different. A flagship universal treaty was missing even though many regional, sub-regional and bilateral treaties were already in place before the ILC had started its codification effort. Many such agreements were specific in nature setting out the obligations and rights of Parties. In the view of the Speaker, the Commission was not working from a clean slate and had to take into account the existence of a wealth of treaties that were developed on the same subject matter.

It was observed that the vast majority of such agreements contained final clauses which subordinated the treaty to “other international agreements”, to “other rules of international law”, or to the “rights and obligations of the Parties under other bilateral or multilateral Treaties, Conventions and Agreements to which they are a Party”. All of those texts clearly spelled out that any other rules of international law, or at least of positive international law, would have precedence over them, and not just “special rules”. Hence, the preferred wording would have been one that limited the overriding force of the Draft Articles vis-à-vis special and other rules of international law.

The Speaker explained what the Commission meant by “special and other rules of international law”. Regarding the different forms of ‘special rules’ that seemed to be covered by that definition, the Speaker identified at first those contained in treaties whose scope ratione materiae fell within that of the Draft Articles (e.g. regional or bilateral treaties on mutual assistance in case of disaster; sectorial treaties dealing with certain types of disasters, including also the status agreements concluded between the affected State and international organizations). Another cluster of provisions considered as ‘special rules’ were those included in treaties devoted to other matters but
which contained specific rules addressing disaster situations (e.g. 1944 Convention on International Civil Aviation, Annex 9, which eased the entry of disaster relief items and personnel).

Instead, the reference to “other rules” seemed to cover those rules which did not have a direct bearing on disaster situations but which remained nonetheless applicable (rules concerning State responsibility; provisions on the law of treaties such as those dealing with fundamental change of circumstances, etc.), as well as customary International law rules, whose formation was not ‘prevented’ by the Draft Articles, hence making the development of further standards possible. Mention was made of possible rules such as those concerning the right of a State to assist or evacuate its own nationals, potential rules on accountability and liability for international relief personnel, and so on.

Once the scope of the provision had been defined, the Speaker focused his attention on the purpose of draft article 20. The content of the draft article appeared sensible to him, to the extent that it permitted the preservation of a dense web of more specific legal commitments that many States had undertaken to abide by. Thus, adopting a ‘teleological’ interpretation of the Draft Articles, it contributed to better protecting the interest of individuals affected by disasters, by granting them a higher degree of protection conferred by bilateral and other treaties. Also, it was recalled that the Special Rapporteur had clarified that the Project enjoyed a ‘residual’ nature, in that it remained applicable to the extent that a more specific treaty did not deal with specific issues which are instead addressed by the Draft Articles. It was suggested that such element could be included in the Commentary.

Another element to be addressed in the Commentary to draft article 20 - which had been present in the Special Rapporteur’s 7th report at para. 68 - was the reference to the fact that it should not be expected that States would conclude bilateral or multilateral agreements containing provisions which were incompatible with the principles and rules enshrined in the Draft Articles. The assumption was that the Project - in its final form - would represent minimum rules in the area of disaster law, and that special rules would be further developed to expand on such basic standards and not undermine them.

The Speaker also tried to identify possible alternatives to the current wording of draft article 20. Looking at the survey conducted by the Special Rapporteur he noted that there were a few different formulations. The first was the so-called ‘belt and suspenders approach’, contained for example in the Inter-American Convention on Disaster assistance, on the basis of which in case of discrepancies between the Project and other international agreements on the subject to which the assisting and assisted States were parties, the provision that afforded the greatest degree of assistance in the event of disaster and favouring support and protection for personnel providing assistance would take precedence. Another solution could have been to accept the subordination of the Draft Articles to any other treaty which was concluded “in accordance with the object and purpose of the convention”, as foreseen by the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, of 1986.

In the opinion of the Speaker, the reason why such bolder approaches had not been adopted lay in the potentially universal scope of the Draft Articles in terms of membership, which made it difficult to think of them as trumping the provisions of more detailed regional or bilateral treaties, especially as it could be difficult to determine which provision was ‘more protective’ or which treaties were in conformity with the ‘object and purpose’ of the Draft Articles. Since some of the draft articles had raised some debate (duty to seek assistance; prohibition of arbitrary withdrawal; certain aspect of the duty to cooperate; etc.), any attempt to give precedence to the Project over other international norms would have probably been difficult to accept.
A final point concerned the comments made by States and International Organizations. It was recalled that Greece had claimed that it was not clear whether the Draft Articles would apply alongside other more specific treaties. In the view of the speaker, this would not have happened had the Commentary included a reference to the residual nature of the Project. Another observation mentioned was that made by the IFRC in the Sixth Committee, which had stated that - given their importance - regional agreements and mechanisms for disaster cooperation ought to have been explicitly mentioned.

**GENERAL DEBATE**

The discussion on article 20 was characterized by widespread support for the provision. The main issue of debate concerned the difficulties to foresee all the possible incompatibilities with other existing rules.

In particular, one of the problems pointed out regarded the identification of the existing agreements which enjoyed a higher degree of specificity in comparison to the Draft Articles, as described in the second paragraph of the Commentary on the application of the principles of *lex specialis*. In fact, in the view of one of the participants, it was possible to have different degrees of specificity with respect to certain provisions. For example if another treaty established more strict requirements for consent, a State would apply that treaty instead of the present one, on the basis of its specificity. However, regarding the arbitrary withholding of consent, there is perhaps more specificity in the Draft Articles than in other instruments. That example demonstrated how complicated the practical identification of ‘special rules’ could be. Another participant questioned whether the reference to “special” added any value, or whether the mention of “other” rules was enough.

The complexity was to find the right level of flexibility. In particular, an excessively broad reference risked losing the innovative impact of the Project, by rendering its progressive elements ineffective. Furthermore some support was expressed for the proposal to give precedence only to more favourable provisions, since otherwise there would be a possibility of giving deference to provisions and regimes that were less favourable to the victims of disaster who were, after all, the intended beneficiaries of the Project. At the same time, the necessity of not entering into conflict with already established regimes, including customary international law, had to be taken into account. The real problem was being able to verify in advance in which cases there could be a counterproductive overlap.

One of the participants suggested introducing a specific reference to the relationship between the Draft Articles and other existing regional frameworks, in acknowledgment of the importance that those systems had acquired in the disaster law field. If such specification were be considered as undesirable in the text, then it could at least be mentioned in the Commentary, which could provide a description of what already existed on the regional level.

Consequently, certain formal characteristics of the Project were recognized as being relevant in relation to the content of draft article 20. A participant noted that the possible modifications in the wording of the provision, during the second reading, would depend on the status of the Project at that stage. More specifically, there would be the need to consider if the level of generality of its content had remained unchanged, or whether it was more detailed in certain aspects. Another formal element to consider was the decision regarding the final form to be given to the entire Project. A binding treaty, in consideration of general character of some of its provisions, would emphasize the possibility of giving precedence to other rules, more favourable for the victims of
disasters. In that sense, draft article 20 could be considered as a ‘work in progress’, in light of the impending final decision of the Commission on the entire Project.

A point was raised regarding the content of the fourth paragraph of the Commentary, which deals with the relationship between draft articles 20 and 21 on the applicability of the Draft Articles in the situation of armed conflict. That paragraph stated that “[w]hile it [was] accepted that in such situations the rules of international humanitarian law should be given precedence over those contained in the present draft articles, these would continue to apply ‘to the extent’ that some legal issues raised by a disaster which occurred in the same area as an armed conflict would not be covered by the rules of international humanitarian law”. In the view of one of the participants, that part of the Commentary could be better placed under draft article 21, in order to avoid confusion. Furthermore reference was made to the ambiguities in the use of the verb “should”, in relation to the precedence to be given to IHL rules in complex emergencies. According to that participant, reference to “should” needed to be replaced with the verb ‘shall’, in order to guarantee more clarity about the applicable legal regime and to provide clear precedence to IHL in situations involving an armed conflict. Furthermore draft article 20 implicitly affirmed that the Draft Articles could also apply in the situation where IHL would have some gaps in terms of law and protection of individuals. However according to that participant, the Commentary failed to identify those gaps and what could be the adverse effects in terms of protection for the application of IHL.
Draft Article 21 \[4\]

**Relationship to international humanitarian law**

*The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.*

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**INTRODUCTION**

The Speaker opened his introductory remarks by stating that, while the language of draft article 21 appeared clear, the Commentary seemed to be much more contradictory, precluding a perfect understanding of the provision.

Initially the Speaker recalled how the ILC had discussed **two alternative options** in order to regulate the subject. The first solution was an express exclusion of the applicability of the Draft Articles in situations of armed conflict as a further element of the definition of ‘disaster’ in draft article 3. The second option had been to construct the provision as a ‘without prejudice’ clause, as done with draft article 20, merely preserving the applicability of both the Draft Articles and international humanitarian law.

Eventually the Commission chose to address the matter in terms of the relationship between the Draft Articles and international humanitarian law, deeming that “**a categorical exclusion could be counterproductive**, particularly in situations of complex emergencies where a disaster occur[ed] in an area where there [was] an armed conflict” and “especially when the onset of the disaster pre-dated the armed conflict”, as was the case, for instance, of the drought that was ravaging Ethiopia at the outbreak of its war with Eritrea in 1998.

Hence, the Speaker highlighted the wording of the final consideration of the Commentary, on the basis of which: “**while the Draft Articles [did] not seek to regulate the consequences of armed conflict, they [could] nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, [did] not apply**”. Such formula seemed quite complicated to interpret, also taking into account that **the Commission had not provided examples of those kinds of situations**.

It was pointed out that a number of **international instruments** directly or indirectly provided assessments on the relationship between international disaster law and IHL. A mutual exclusion was provided by article 1 of the 1984 UN proposed **draft Convention on Expediting the Delivery of Emergency Assistance**, while article 10 of the 1998 **Tampere Convention** contained a ‘without prejudice’ clause (“the Convention shall not affect the rights and obligations of States Parties deriving from other international agreements or international law”) and the language of article 11 of the 2006 **Convention on the rights of persons with disabilities** had a similar result. Regional and bilateral agreements normally excluded situations of armed conflict from the definition of ‘disaster’.

As **soft-law** was concerned, the **Bruges Resolution** of the Institute of International Law of 2003 on humanitarian assistance put on the same footing disasters of natural or technological origin or caused by armed conflicts or violence, even if the Resolution as a whole was ‘without prejudice’ to the “principles and rules” of IHL. On the contrary, the IFRC’s **IDRL Guidelines** of 2007 were not intended to apply to situations of armed conflict or to disasters that occurred during an armed conflict. Using a different approach, the **2011 IASC Operational Guidelines on the Protection of**
Persons in Situations of Natural Disasters ended up with a similar result whereby IHL was not applicable in natural disaster settings, unless in an armed conflict civilians under the control of a party to the conflict were affected (however, that situation was not addressed by the Operational Guidelines).

The Speaker recalled how IHL included important provisions on humanitarian assistance, that could protect persons during disasters as well. In particular articles 23 and 59 of the 1949 Fourth Geneva Convention, articles 70 to 71 of the 1977 Protocol Additional to the 1949 Geneva Conventions and relating to the protection of victims of international armed conflicts and article 18 of the 1977 Protocol Additional to the 1949 Geneva Conventions and relating to the protection of victims of non-international armed conflicts were some of the main examples in the area. However, as the Commentary to the Draft Articles recognized, where a disaster occurred in an area where there was an armed conflict - especially a non-international one - it was not certain that IHL could adequately govern relief activities.

The provisions of the First and Second Geneva Conventions were suited to ensuring assistance and relief to disaster victims who were protected persons under the said Conventions, i.e. members of the armed forces in the field and at sea. However, the wounded, sick, and shipwrecked not belonging to the armed forces hit by a catastrophic event unrelated to armed military activities would fall outside their scope.

Furthermore, in the view of the Speaker, the special situations of different vulnerable groups was hardly taken into consideration by IHL, which only referred to women and children. Moreover, not all countries were parties to the two Additional Protocols. As a consequence, although IHL was always applicable in situations of armed conflict, it could not have all the necessary rules for efficiently managing relief and assistance in cases of disaster.

It was noted that the observations and comments made by States within the Sixth Committee of the UNGA could be grouped into two categories. A first group of States (including the Russian Federation, United States and the Nordic Countries) maintained that a specific exclusion of situations of armed conflict from the scope of the Draft Articles ought to be included in the text. A second group of countries (including other European and non-European countries) while recognizing the priority of the lex specialis of IHL, which continues to apply in situations of armed conflict, also felt that the Draft Articles ought to be applicable ‘without prejudice’ to the application of IHL; in that sense the two sets of provisions would apply in parallel where appropriate so that the Draft Articles remained applicable in 'complex situations' of both armed conflict and natural or environmental disasters.

In the view of the Speaker, as a matter of law, IHL and international disaster law were not mutually incompatible. On the contrary, they shared the very same aim: the protection of the human person in situations of danger and suffering. Moreover, both were considered as lex specialis with respect to human rights law.

The choice of which body of special rules was to be applied had to be made on the basis of its degree of appropriateness to a specific situation, taking into consideration the clarity and precision of pertinent provisions. For that reason, the Speaker asserted that in his view a ‘without prejudice’ clause was preferable and more in line with the contemporary practice that increasingly accepted the parallel application of a different body of international rules, e.g. IHL and international human rights law.

If, however, after the second reading the language of draft article 21 was retained and the
Commentary maintained the prevailing position, it would have been advisable to specifically mention some **practical examples** of situations of armed conflict where the existing rules of IHL could not ensure adequate relief to victims of disasters, while the application of the Draft Articles would improve their protection.

**GENERAL DEBATE**

The debate on draft article 21 was characterized by interventions which expressed a **firm position in defence of a clear precedence of international humanitarian law over the content of the Draft Articles** in situation of armed conflicts, and by other remarks in which participants, while recognizing the considerable complexity of the issue, **supported the choice to leave open the possibility of a synergic application of IHL and the Draft Articles** in relation to so-called ‘complex emergencies’.

The first position was supported by some of the participants, who pointed out the discrepancies of the text of the Commentary, particularly evident if compared to the clarity of the rule itself, which specified that the Draft Articles did not apply to situation to which the rules of IHL applied so as to exclude situations of armed conflict from the scope of the Draft Articles. If the Draft Articles and the Commentary were to be taken together, the **lack of coherence** between the two texts gained even more credence. Moreover, in the view of one participant, the parallel application of IHL and the Draft Articles could easily lead to legal uncertainty, notwithstanding the existence of the *lex specialis* principle.

Such contingency would also give to the States the possibility of choosing - in the course of an hypothetical negotiation on the access to the population in need during a complex emergency - the set of rules that ensured them the **higher level of control and direction on the provision of humanitarian assistance** and over the activities of the relief actors. Those would be the Draft Articles, which were more deferential to State’s sovereignty than IHL. The result, in the opinion of the participant, would be a reduction of the humanitarian space. It was also emphasised that IHL did not put in place specific conditions for the provision of external assistance, apart from the respect for basic humanitarian principles, while on the contrary **draft article 15** could give room for affected States to establish a series of technical and operational requirements, which could hinder humanitarian assistance in complex emergencies. Under that view, in cases of such types of emergencies, it would be easier and more practicable for a humanitarian actor to negotiate access on the basis of IHL than on making reference to the Draft Articles.

An additional point that was raised in defence of a general primacy of IHL in situation of disasters occurring in a State affected by an armed conflict, concerned the fact that its **set of rules** could be considered as being **well-developed and well-rooted** on some specific issues relevant in disaster scenarios, as for example in the case of the right of humanitarian initiative or humanitarian access, an aspect which was well structured through a series of rules both in relation to international armed conflicts and non-international ones which had already been endorsed and accepted by States. In the same vein, reference was made to provisions dealing with the protection of specific categories of **vulnerable persons and groups**, while the content of the ILC Project still needed to address in detail such issues.

The possibility of solving such issues on the basis of some **geographical criteria** was also considered as being unproductive, in light of the fact that the applicability of IHL on the territory of a State in which an armed conflict was occurring, was automatically extended to the entirety of that territory,
denying the possibility to foresee the application of the Draft Articles in the areas stricken by a disaster, not strictly considered as battlefields.

On the other side, some participants were more inclined to consider the possibility of a mutual reinforcement of the two regimes. First they pointed to the fact that, notwithstanding the accepted position that IHL should take precedence over the Project when it was more specific and could provide a proper solution in some scenarios, draft article 21 could still leave open the possibility for the Draft Articles to address other issues not regulated by IHL. Consequently the Draft Articles could represent an added value to protect victims of disasters.

It was claimed that IHL might eventually not be enough to deal with disasters that were happening in the same arena. According to this view, such evaluation should concern not only the relevant aspects of protection, but also more specific and operational aspects of assistance that appeared especially not well specified in relation to non-international armed conflicts. In that perspective, a participant suggested that IHL was too geared towards a specific set of issues and problems, and calibrated on particular actors and policy considerations, and that the solutions provided by it could occasionally not be the most appropriate in the case of disasters. Furthermore taking into account difficulties in identifying the fulfilment of the threshold for the application of IHL in certain scenarios, mainly with regard to situations of non-international armed conflicts, the possibility of using the Draft Articles as a background document could be significant. In any case, it was suggested that some references to practical examples of possible gaps ought to be added in the Commentary, at least to clarify the possibility of such complementary application.

Rather than qualifying the relationship between IHL and the Draft Articles in terms of competition it was emphasised that in several instances the ILC had drawn direct inspiration from IHL provisions and that some of the same principles were common to both sets of rules, as for example in relation to humanitarian principles to be respected during the response phase.

Some participants pointed to the discrepancies between the text of draft article 21 and the Commentary and suggested the inclusion of a ‘without prejudice clause’ to better clarify the envisaged relationship.

Apart from the abovementioned general remarks, a number of points illustrating some practical examples relevant for the definition of the problem were raised. One of the participants mentioned the possibility of a disaster occurring in part of the territory of a State which was controlled by an organized armed group. In that regard, was not clear which rules of the Draft Articles could be applicable and what could be the role of non-state actors. At the same time, the possibility of accepting that, due to the application of IHL in the territory of the involved State, the humanitarian response to an eventual massive disaster could not take advantage of the provisions contained in the Draft Articles, was considered to be too difficult to accept.

Furthermore it was emphasised that some practice in the area of disaster law accommodated the idea of the potential application of relevant instruments also in relation to disasters occurring in complex emergencies. By way of example, the European Consensus on Humanitarian Aid developed in 2008, maintained that humanitarian assistance was provided in response to man-made crises “including complex emergencies”, and to natural disasters as needed. Paragraph 16 of that document placed some conditions, for instance by specifying that in complex emergencies “recourse to civil protection assets should rather be the exception [...] their use in complex emergencies, including in situation of fragilities [was] delicate and sensitive as it risk[ed] compromising the perception of neutrality and impartiality of the relief effort. This [could] result in
exposing relief workers as well as the affected population to attacks from warring parties and in denying access to the affected population not only in the current but also in future emergencies”.

The suggestion that a **clear solution** on those issues needed to be found within the Draft Articles was shared by some participants, in consideration also of the longstanding and complex debate on the parallel application of IHL and international human rights law. In fact, the risk was that further theoretical debates on such issues would only weaken the capacity to protect persons affected by a disaster.
Final Session

The way forward and the missing issues

The final session of the Expert meeting was devoted to a general debate on what had emerged from the previous discussions and on what was expected to be the way forward for the Project. In particular the discussion focused on: (i) the final form of the current Project; (ii) additional topics to be addressed by the Commission in the area and a re-orientation of some of the current provisions.

Concerning the final form of the Project, it was recognized that the possibility to propose a set of Guidelines, as had recently been done by the Commission in relation to other projects, was considered inefficient, mainly because it would imply a formal re-drafting of the text, that would risk taking too much time and impair its content. Furthermore, several participants underlined that the disaster domain was already well furnished with soft-law instruments, and that another document of such nature would probably contribute little added value.

The original mandate of the ILC and one of the participants addressed the fact that the ILC had the authority, under its Statute, to recommend a treaty or to express the view that a particular topic could be regulated by a binding instrument. This meant that the ILC could exert a considerable influential power in the law-making sphere for the evolution of international law, independently from the fact that States could immediately respond positively to those inputs or not.

Consequently, in consideration of the lack of a universal instrument in the area, and as the current form of the text suggested, the idea of proposing the draft articles as a basis for the negotiation of a binding treaty was supported by many participants. Such instrument would likely contain important statements on rights and duties in an area which was mostly uncodified in terms of hard law. Some participants were more neutral on the possibility of developing a treaty in this regard, while one participant reminded that his Institution’s position would depend on whether the Draft Articles maintain in or exclude from their scope of application situations of armed conflict.

One of the first questions raised concerned the fact that a prior attempt to conclude an universal convention of the same topic took place at the end of the 70’s and in the first part of the 80’s. One of the participants queried whether something had really changed since then, in order to avoid the risk that the same attempt would not fail again. In response, it was observed that the 2004 Tsunami and other recent mega-disasters could have had an impact on the perception of the relevance of the topic. It was also noted that States were inclined to undertake negotiating processes in relation to universal treaties primarily when it was in their interest or need to do so. According to one participant, the recent conclusion of significant universal treaties, such as the Arms Trade Treaty and current discussions on other topics, testified that such possibility could not be ruled out, especially as the interest in the area increased.

At the same time, some difficulties in engaging in such process were referred to by some participants. First the inherent risks of proposing the conclusion of a treaty was that the subsequent negotiation process managed by States could modify the content of the Draft Articles. Some modifications would probably slightly erode its content. But, other participants observed that the final result would still be significant, even if the final text would be different from the original proposals of the ILC. It was also noted that the eventual approval of a treaty could not be considered to be the final result. The possibility of States not signing or ratifying the treaty, or of
entering reservations or interpretative declarations, as well as the difficulties related to the internalization of the treaty into domestic law, constituted further elements to take in consideration, and which would possibly undermine the achievement of adopting a treaty.

At the same time other participants noted that these were concerns common to any treaty-making process. Even in the case of an unsuccessful overall outcome, the States’ negotiation process and conclusion of an international treaty in the area could be considered necessary and helpful for the development of new legal paradigms. It was recalled that the types of treaties that the Commission developed enjoyed a distinct expository nature, in terms of detailing the legal regime applicable to a specific area. The drawback was that some States did not consider it necessary to ratify such treaties as they took the view that their content already reflected international standards. Furthermore treaties have always had a catalytic effect, in the sense that they become the new legal threshold on a specific topic, the basis from which subsequent legal activities are undertaken. This was the case for the law of the sea and for certain instruments on human rights law, in relation to which it was not conceivable to go return to the legal situation existing prior to those treaties.

Conversely, it was conceivable that the negotiation processes would prove unsuccessful, as had happened in the past with other instruments. The risk in that case was that the Project would remain in a sort of limbo, as a non-binding statement of the law.

In that regard, however, another participant noted the current Draft Articles already had a strong impact in terms of inspiration for other negotiation processes and also for other kinds of contemporaneous activities. The Sendai Framework on Disaster Risk Reduction was indicated as an example, as it was an instrument that would benefit from a complementary document of a strong legal nature, such as the proposed treaty to be adopted on the basis of the draft articles. In the view of another participant, the approval of a binding treaty would also have a positive effect in relation to Disaster Risk Reduction. In many States DRR activities area were still dealt with by several disaster management authorities, many of whom acting at sub-national levels without the possibility of establish a national approach. A binding treaty would imply the increased involvement of national authorities, creating the incentive for them to implement a more comprehensive approach in the DRR sphere.

It was recognized that the final decision on the future of the Draft Articles would depend on the reaction of the United Nations General Assembly to the proposal made by the Commission. It was hoped that, during the second reading, a revision of the Project would be undertaken so as to take into account the comments and the observations that States and International Organization will have submitted by January 2016, and also with a view to taking on board some of the remarks made in the course of the Expert meeting.

Concerning the second main point addressed during the final remarks, i.e. additional topics to be evaluated by the Commission in this area or a re-orientation of some of the current provisions, several comments were made by participants.

First, taking into account previous comments, specific remarks concerned the need to develop also a preamble and some final clauses, so as to provide a comprehensive final text to be submitted to the 6th Committee of the UNGA. Such provisions ought to also take into account the possible involvement of International Organizations in the proposed instrument as they could be a potential audience interested in the subsequent treaty-making process. Such possibility would entail also the need to deal with some additional topics particularly relevant for those actors, such as the coordination of relief operations and the involvement of international organizations in that area.
Other subjects that some participants proposed as worthy of consideration during the second reading included those of the position of transit States and that of the quality and the cost of the assistance. Other suggestions concerned the need for the ILC to focus on the lack of preparedness of States in relation to a general regulation of problems to be faced in disaster scenarios.

Furthermore, the need to focus on technical aspects could also lead to the possibility of positioning the current text as a framework convention to which specific technical annexes could be developed, concerning detailed aspects of relief assistance, including the possibility of foreseeing some common international standards, like the ones existing for international aviation or international telecommunication services. In case such solutions could not be achieved in the framework of the current activities of the ILC, similar approaches could be envisaged by future fora responsible for developing a universal treaty in the area, such as a Diplomatic Conference and related preparatory activities. Such a possibility could both avoid ‘freezing’ technical aspects in the current text and facilitate the confidence States could have in accepting external assistance. A specific technical body composed of experts of State parties or, similarly, a Secretariat could fulfil such additional tasks.

A specific point was raised in consideration of the relationship that would be established between a possible future treaty and IHL rules. It was remarked that – in the ‘common’ contexts of disasters - the positive impact of a treaty would be beyond dispute, and would constitute a very useful complementary tool to the IFRC Guidelines, that could make a difference. This could permit for example reaching population eventually affected by a disaster in those situations in which internal violence and disturbances did not amount to an armed conflict, or in which the governmental authorities refused to recognize the existence of an armed conflict on their territory. At the same time, if the existence of an armed conflict was clear and recognized and a so-called “complex emergency” developed due to a concomitant disaster, the future text needed to clearly regulate its relationship with IHL, in order to attribute a clear precedence to the latter branch of law.

Concerning the content of the Draft Articles, one participant expressed concern about the added value that the Project was likely to provide, in terms of operative impact on the provision of humanitarian assistance. In particular, he stated that most of the principles contained therein were already well known by States, as for example the primary responsibility in managing the disaster or the need to guarantee protection and respect for certain human rights. While he admitted that the Project contained some innovative elements, like the duty to seek assistance or the duty to reduce disasters, his impression was that humanitarian assistance was just a matter of international cooperation, where a significant role was played by the attitude of affected States. In that regard other documents, such as the IFRC Guidelines, could respond more directly to the needs of practitioners.

Another participant noted that the answer depended on who the audience was, which could be that of the legal advisors. Such practitioners were usually unfamiliar with certain legal dynamics of the area, and so in that light the Project would gain a sort of instructive added value. Another possible audience envisaged was the staff of international organizations, which could also benefit from a common set of general rules and principles in order to obtain certain results, for instance in negotiating with the affected States issues dealing with international assistance. It was noted, for example, that it would not be the necessity to renegotiate the general legal framework every time, but instead the treaty would provide a basic legal “floor”, thereby allowing room for negotiators to focus on aspects specific to an assistance operation. The treaty would also, more generally speaking, guide the relations of States and organizations involved in the humanitarian field.
On this point another participant suggested that the ILC should pause for a moment, before **deciding on the direction that the Draft Articles will take.** It was recalled that, while the title referred to the protection of individuals and thus had created strong expectations that the topic would be centred on individual rights, at the end the main content of the Project ended up being about international response. Other participants were of the view that, even if the direction had partly shifted throughout the process, the Draft Articles could still provide solutions to important issues that necessarily affect human rights protection, helping to ease the relationship and processes in that sense.

Despite recognizing the importance of establishing some duties and obligations incumbent upon States, especially in order to deal with situations in which national authorities decline international assistance, it was pointed out that those scenarios constituted extreme and rare cases. The more common problems concerned the lack of preparedness and of general regulation in the area. So, it appeared important to focus on the core issues of the Project, even if that meant setting aside some of the issues that might slow down and complicate the process of completing the work, if necessary.

On the **possibility of future changes to the content of the draft articles**, participants emphasised the fact that the process would benefit from the proposals and **comments to be submitted to the ILC Secretariat by States and International Organizations by January 2016.** On the basis of what will be proposed, the Special Rapporteur and the Commission would have the possibility to evaluate possible modifications in order to strengthen the content of the Project during its second reading. Some comments were also made on the possibility of the Special Rapporteur taking into account some of the **suggestions made during the Expert Meeting**, with a view to improving the content of the Draft Articles.
Texts and titles of the draft articles adopted by the Commission on first reading

Protection of persons in the event of disasters

Article 1 [1] Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2 [2] Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3 [3] Definition of disaster

“Disaster” means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Article 4 Use of terms

For the purposes of the present draft articles:

(a) “affected State” means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(b) “assisting State” means a State providing assistance to an affected State at its request or with its consent;

(c) “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(d) “external assistance” means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

(e) “relief personnel” means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

(f) “equipment and goods” means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction.

1 The numbers of the draft articles, as previously provisionally adopted by the Commission, are indicated in square brackets.
Article 5 [7] Human dignity
In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 6 [8] Human rights
Persons affected by disasters are entitled to respect for their human rights.

Article 7 [6] Humanitarian principles
Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 8 [5] Duty to cooperate
In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Article 9 [5 bis] Forms of cooperation
For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Article 10 [5 ter] Cooperation for disaster risk reduction
Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Article 11 [16] Duty to reduce the risk of disasters
1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Article 12 [9] Role of the affected State
1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Article 13 [10] Duty of the affected State to seek external assistance
To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Article 14 [11] Consent of the affected State to external assistance
1. The provision of external assistance requires the consent of the affected State.
2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Article 15 [13] Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 16 [12] Offers of external assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

Article 17 [14] Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

   (a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

   (b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 18 Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

Article 19 [15] Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actor wishing to terminate shall provide appropriate notification.

Article 20 Relationship to special or other rules of international law

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

Article 21 [4] Relationship to international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.
The International Disaster Law Project

The International Disaster Law Project started in 2013 at the initiative of scholars of four Italian Universities (Giulio Bartolini, Roma Tre University; Federico Casolari, Alma Mater – Bologna University; Emanuele Sommario, Sant’Anna School of Advanced Studies; and Flavia Zorzi Giustiniani, International Telematic University Uninettuno) with the main objective of identifying the current international legal framework with respect to the prevention and management of disasters. The IDLP Project is financed by the Italian Ministry of Education, University and Research under the grant Programme FIRB “Futuro in Ricerca 2012”.

One fundamental element in the project is represented by the partnership with relevant stakeholders in this area such as: the International Federation of the Red Cross and Red Crescent Societies; the International Institute of Humanitarian Law; the Italian Civil Protection Department; ALNAP; The Italian Red Cross. IDL Project members have also offered their assistance to dr. Eduardo Valencia-Ospina, Special Rapporteur of the ILC on the Protection of Persons in the Event of Disasters. The IDL Project is also currently engaged in the elaboration of research publications.

Among its various outputs, the IDL Project organizes conferences, expert meetings and workshops aimed at the dissemination of IDL and at the stimulation of academic and professional debates. Academic events organized or co-sponsored by the IDL Project or to which its members participated include: Symposium "Confronting Legal Issues in the Wake of International Disasters” with Vanderbilt University and the American Society of International Law – Disaster Law Interest Group; “Floodling and Other Disasters: Assessing the Current Legal Framework”, British Institute of International and Comparative Law, London; Conference on “Protection and Safeguard of Cultural Heritage from Risks Connected to Natural and Man-made Disasters”, Uninettuno University; Presentations at conferences and courses organised by: China University of Political Science and Law, Beijing; Geneva Academy of IHL and HR; Australian National University; AFAC Conference, Wellington; Italian Ministry of Defence; Trinity College, Dublin; King’s College, London; Milan and Trento Universities.

The IDL Project organizes in Sanremo, in partnership with the International Institute of Humanitarian Law and the IFRC and with the support of the Italian Red Cross, the “INTERNATIONAL DISASTER LAW COURSE”. This training course is a unique one-week intensive programme offering participants from all over the world a comprehensive overview of the main legal and humanitarian aspects of disaster prevention and management activities (see http://www.iihl.org/idlcourse). Furthermore, in cooperation with the Italian Red Cross, the IDL Project has developed the 3-days “IDRL COURSE”. This course is tailored for staff and volunteers of this National Society involved or having an interest in international disaster relief operations. This course represents a pioneering initiative in the Red Cross/Red Crescent Movement.

In 2015 the IDL Project has published in English and in Italian the 115-pages “IDRL in Italy Report”. The Report was commissioned to the IDL Project by the Italian Red Cross and developed with the support of relevant institutions. The Report identifies major obstacles and pinpoints legal solutions to international cooperation issues in the event of disasters occurring in Italy.

For further information please visit our website www.disasterlaw.sssup.it